83-1313

NO. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TWIN PARKS LIMITED PARTNERSHIP,

PETITIONER,

VS.

N.S.C. CONTRACTORS, INC.,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a pre-Bankruptcy Reform Act of 1978[1/], non-Article III[2/], bankruptcy judge had jurisdiction to decide state law contract claims and counterclaims between a debtor (Twin Parks Limited Partnership) that petitioned for a real property arrangement under Chapter XII[3/] of the Bankruptcy Code[4/] and a contractor (N.S.C. Contractors, Inc.) that performed work on the debtor's residential apartment project (where the case was presented to the bankruptcy court via an adversary proceeding by N.S.C. against Twin Parks initiated after an American Arbitration Association proceeding and a state court mechanic's lien case, pending between the

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1/ 11 U.S.C., Sec. 1 et seq. (1979 and Supp. 1983)

2/ U.S. Const., Art. III, Sec. 1

3/ Former 11 U.S.C., Sec. 801 et seq.

4/ Former 11 U.S.C., Sec. 1 et seq.

parties when the Chapter XII petition was filed, were stayed by a Rule 12-43[5/] order).

LIST OF PARTIES

Twin Parks Limited Partnership and N.S.C. Contractors, Inc. were the only parties to this case in the United States Court of Appeals for the Fourth Circuit, in the United States District Court for the District of Maryland and in the United States Bankruptcy Court for the District of Maryland.

5/ Rule 12-43, Rules of Bankruptcy Procedure

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No. 83-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TWIN PARKS LIMITED PARTNERSHIP,

Petitioner,

vs.

N.S.C. CONTRACTORS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Twin Parks Limited Partnership ("Twin Parks"), prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Fourth Circuit, entered on November 9, 1983 in a cause there entitled In Re: Twin Parks Limited

Partnership N.S.C. Contractors, Inc., Appellee, vs. Twin Parks Limited Partnership, Appellant, No. 82-1459 in that court, as affirms an order entered on April 16, 1982 by the United States District Court for the District of Maryland (No. N-81-2047) which affirmed in all substantive respects (but modified by reducing, with N.S.C.'s consent, the amount of interest and costs awarded) an order of the United States Bankruptcy Court for the District of Maryland (No. 79-01029-L), made on May 14, 1981, entering a money judgment in favor of N.S.C. on its contract claims against Twin Parks, and dismissing Twin Parks' counterclaim. The court of appeals rejected the contention, raised there by Twin Parks for the first time in the case, that the bankruptcy judge lacked jurisdiction. It reversed that part of the district court's order which awarded N.S.C. post-Chapter XII

petition prejudgment interest and to that extent reduced the money judgment entered against Twin Parks. It affirmed the remainder of the district court's order entering that judgment.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at ___ F.2d ___. (A copy is appended hereto. Infra, App. 2 .)

The opinion of the United States District Court for the District of Maryland in this case is reported at ___ F.Supp.2d ___. (A copy is appended hereto. Infra, App. 19 .) (That opinion, in Twin Parks' submission, is not relevant to the jurisdictional issue, which is the only one presented by this petition, since that issue was not raised or decided in the district court, but was raised for the first time in the court

of appeals.)

The opinion of the United States Bankruptcy Court for the District of Maryland in this case, delivered orally in open court on May 9, 1981 and later transcribed, is reported at ___ B.R. ___. (A copy is appended hereto. Infra, App. 66.) (That opinion, in Twin Parks' submission, is not relevant to the jurisdictional issue, which is the only one presented by this petition, since that issue was not raised or decided in the bankruptcy court, but was raised for the first time in the court of appeals.)

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was dated November 9, 1983 and was entered on that day. (A copy of the Notice of Judgment issued by that court is appended hereto. Infra, App. 1.) The jurisdiction of this Court is invoked under

28 U.S.C., Sec. 1254(1), former 11 U.S.C., Sec. 47, and Rules 20.2 and 20.4 of the Revised Rules of this Court, effective from June 30, 1980, as amended to December 31, 1982.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Art. III, Sec. 1, provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

STATEMENT OF THE CASE

Twin Parks believes that the opinion of the United States Court of Appeals for the Fourth Circuit concisely sets out a substantial portion of the facts material to consideration of the single question

presented by this petition, as follows:

> "Twin Parks Limited Partnership appeals from the district court's judgment affirming the bankruptcy judge's decision in favor of N.S.C. Contractors, Inc. Twin Parks contends that the bankruptcy judge lacked jurisdiction to decide N.S.C.'s state law claim of breach of contract. Twin Parks also challenges the award of post-bankruptcy petition interest to N.S.C., and assigns numerous other errors. Finding merit in the appellant's challenge to the award of interest but none in its other arguments of error, we affirm the district court's decision except that part awarding post-petition interest. We reverse that part of the decision and reduce the money judgment accordingly.
>
> "Twin Parks filed a Chapter XII petition on June 14, 1979, seeking a real propert arrangement under the Bankruptcy Code[1]. Pending at the time were two proceedings initiated by N.S.C. Contractors to resolve a contractual dispute with Twin Parks over monies owed for work performed on its residential apartment project. One of the proceedings was before the American Arbitration Association, which was designated by contract to handle disagreements. The other proceedings was pending in the Circuit Court for Worcester County, Maryhland, and involved N.S.C.'s claim to a mechanic's

lien against buildings it had constructed for Twin Parks. The bankruptcy judge issued a Rule 12-43[2/] order after Twin Parks' Chapter XII petition was filed, staying both the arbitration and state court proceedings.

"N.S.C. subsequently filed a complaint with the bankruptcy court seeking to lift the stay order or, alternatively, asking the court to allow its claim against the debtor. Twin Parks answered, filed a counter claim and specifically requested the court to take jurisdiction over the dispute. It demanded a jury trial on all issues pertaining to the state law breach of contract claim. This demand was denied and the bankruptcy judge heard and decided the case without a jury. The trial began on July 29, 1980, was delayed several times due to the illness of Twin Parks' major shareholder and was finally concluded in favor of N.S.C. on May 9, 1981. Twin Parks appealed the adverse judgment to the district court which reviewed the record and affirmed the bankruptcy judge's order on April 20, 1982."
(Slip Opinion, pp. 2-3; infra, App. 3-6; footnotes omitted.)

The court of appeals, in rejecting Twin Parks' jurisdictional argument, noted that the result it reached might be

different if Twin Parks had not been "voluntarily before the (bankruptcy) court" (Slip Opinion, p. 4; infra, App. 8) and if Twin Parks' "action was not underway on the effective dates of the Northern Pipeline and Reminc decisions" (Slip Opinion, p.5; infra, App. 8 ; emphasis in original), and commented in part that:

> "...Northern Pipeline and Reminc obviously provide support for its (Twin Parks') argument that pre-Reform Act bankruptcy judges, acting under the supervision of Article III District Courts, cannot decide claims arising entirely under state law without the consent of the parties. Northern Pipeline, 73 L.Ed.2d, at 625; Reminc, 704 F.2d at 1318. The Reminc Court's discussion was particularly supportive, stressing the point that pre-Reform Act judges are not sufficiently adjunct to the district court to justify their exercise of federal judicial power[5] over state disputes. Twin Parks, however, cannot benefit from these recently announced decisions because they were intended to operate prospectively. Twin Parks' claims were fully litigated by the bankruptcy judge, affirmed by the

> district court and pending on appeal well before the effective dates of the Northern Pipeline and Reminc decisions." (Slip Opinion, p. 5; infra, App. 8-9; footnote omitted.)

The Court of Appeals also rejected Twin Parks' contention "that only cases which have exhausted appeals are foreclosed by a 'prospective' change in the law" (Slip Opinion, p. 6; infra, App. 11) and its argument "that an appellate court is bound to apply the law in effect at the time it renders a decision -- in this case the jurisdictional rule established by Northern Pipeline." (Id.)

REASONS FOR ALLOWING THE WRIT

IN THIS CASE THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, VIZ. THE JURISDICTION OF PRE-REFORM ACT BANKRUPTCY JUDGES TO DECIDE ENTIRELY STATE LAW CASES. THAT QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. (MOREOVER, THE COURT OF APPEALS DECIDED THAT QUESTION IN A WAY IN CONFLICT WITH THE PRINCIPLE INVOLVED IN THE DECISION OF THIS COURT, IN NORTHERN PIPELINE.)

In this case a pre-Reform Act bank-

ruptcy judge in the District of Maryland decided what was patently a strictly state law contract case involving claims and counterclaims arising out of a contract between Twin Parks, as developer, and N.S.C., as contractor, for construction of a residential apartment development in Salisbury, Maryland. In doing so, the bankruptcy judge exercised all the available judicial power of the United States. The bankruptcy judge was, of course, not an Article III judge. See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co., ___ U.S. ___, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). Nor was he sufficiently adjunct to the district court to justify his exercising the federal judicial power over state disputes residing in that court. See 1616 Reminc Ltd. Partnership v. Atchinson & Keller Co., 704 F.2d 1313 (4th Cir. 1983). It is plain that the bankruptcy judge had no constitutional (or statutory) right, power

or authority to decide the instant case, but he did.

The case came to the bankruptcy court because Twin Parks, as debtor, on June 14, 1979, shortly before the effective date of the Reform Act, filed a petition for a real property arrangement under Chapter XII of the Bankruptcy Code (former 11 U.S.C., Sec. 801 et seq.). (The case hence was dealt with, under Sec. 403(a) of the Reform Act, as one controlled by pre-Reform Act law. See 11 U.S.C. prec. Sec. 101 (1979 and Supp. 1983). One consequence was denial of Twin Parks' demand for jury trial of issues relating to the state law breach of contract claims (at least of those pertinent to its counterclaim).)

When Twin Parks filed its Chapter XII petition there was pending between it and N.S.C. an American Arbitration Association arbitration proceeding, initiated by N.S.C. under a provision

for arbitration of disputes contained in the construction contract involved. There was also pending between the parties a claim for a mechanic's lien against Twin Parks' property where the apartments were being constructed brought by N.S.C. in the Circuit Court for Worcester County, Maryland. (That county was the situs of the apartment construction project.) Both of those proceedings were stayed by filing of the Chapter XII petition (Rule 12-43, Rules of Bankruptcy Procedure). Their underlying subject matters were ultimately disposed of in the subsequent adversary proceeding heard by the bankruptcy judge in several sessions, over a period of time extending from July 29, 1980 until May 9, 1981, and decided by him on the latter date. Twin Parks did not raise any jurisdictional issue before the bankruptcy judge.

Twin Parks then, on May 19, 1981,

appealed to the district court. That court reviewed the case, on the record made in the bankruptcy court (and applying the rule that the bankruptcy judge's factual findings were to be upheld unless clearly erroneous, in accordance with Rule 810, Rules of Bankruptcy Procedure). It affirmed in all substantive respects the bankruptcy court's order entering a money judgment in favor of N.S.C. (although, with N.S.C.'s consent, it modified that judgment by reducing some of the interest and costs awarded). Twin Parks did not raise any jurisdictional issue in the district court.

Twin Parks then, on May 14, 1982, appealed to the United States Court of Appeals for the Fourth Circuit, as it was entitled to do. (Twin Parks had, prior to its appeal to the district court, asked N.S.C. to consent to the alternative procedure, available only by consent

of both sides, of an appeal to the court of appeals directly, 28 U.S.C., Sec. 1293 (b), thus bypassing the district court, but N.S.C. declined.) While Twin Parks' appeal to the court of appeals was in process, this Court, on June 28, 1982, decided Northern Pipeline. In its brief in the court of appeals, filed on April 12, 1983, Twin Parks, for the first time, pointed to the jurisdictional defect in the bankruptcy court's proceedings and made the contention with regard to that court's lack of jurisdiction which it now still seeks to advance.

Twin Parks' simple assertion is that the bankruptcy judge, as a non-Article III judge, had no right, power, authority or ability (i.e. no jurisdiction) to decide this state law contract case, regardless of Northern Pipeline, or Reminc, or the effect given either or both of those decisions. Northern

Pipeline, of course, supports Twin Parks' position, on the principle involved, but is not essential or even necessary to that position. Northern Pipeline dealt with a post-Reform Act case and declared unconstitutional that act's broad grant of jurisdiction to bankruptcy judges "of all civil proceedings arising under Title 11 or arising or related to cases under Title 11" (28 U.S.C., Sec. 1471(b), 1976 Ed., Supp. III), as being violative of Article III, Sec. 1, of the Constitution. Thus, Northern Pipeline illustrates, or is one example of, application of the principle which Twin Parks sought to have the court of appeals apply, with respect, in the instant case, to the pre-Reform Act law, viz. that a non-Article III judge cannot decide disputed state law created contract rights. That principle certainly exists, and enjoys undiminished vigor, with or without the de-

cision in Northern Pipeline (which, since it was a post-Reform Act case, cannot in any event control this pre-Reform Act case). Even if that decision is afforded only the most restricted prospective effect, so that it is not applied to cases still in the appellate pipeline at the time of its rendition, on June 28, 1982, that would not make any difference here. If the post-Reform Act bankruptcy judge, as Northern Pipeline declares, had no jurisdiction of state law created claims, because he was not an Article III judge, then a fortiori the pre-Reform Act bankruptcy judge is even less likely to have such jurisdiction, for the same reason. (The post-Reform Act judge at least had the benefit of an act of Congress, until Northern Pipeline.) Northern Pipeline was only this Court's first announcement and application of the constitutional principle there involved. That decision

did not create either the principle, or its constitutional basis. Both clearly existed, since promulgation of the Constitution, independently of Northern Pipeline or any other judicial recognition.

Reminc also supports Twin Parks' position on the jurisdictional issue, since it takes away the "adjunct to the district court" argument often offered to support a claim of jurisdiction in the bankruptcy court in the instant situation. (Reminc was decided on April 14, 1983. Twin Parks' brief in the court of appeals had been filed two days earlier, on April 12, 1983.) Reminc, which deals with a post-Reform Act case, and is to that extent closer to this case than is Northern Pipeline, and which holds, favorably to Twin Parks' contentions, that an on the record review, under the clearly erroneous standard, of the bankruptcy judge's factual findings by an Article III dis-

trict court judge did not cure the non-Article III bankruptcy judge's lack of jurisdiction over state law claims, again illustrates, and even refines, application of the consitutional requirement that only an Article III judge can do what the bankruptcy judge did in the instant case, but Reminc is no more essential or necessary to Twin Parks' position than is Northern Pipeline. Hence, even if Reminc is allowed only prospective effect and such effect is deemed to prevent its application to any case in process as of April 14, 1982, none of that would defeat Twin Parks' jurisdictional attack, since even if Reminc (and Northern Pipeline) had never been decided the constitutional requirement of an Article III judge to decide the instant case would still exist, would still apply and would still vitiate the decision made by the bankruptcy court, its affirmance by the district

court and the further (erroneous, Twin Parks says) affirmance of the latter action by the court of appeals.

Twin Parks believes, as it urged in the court of appeals, that even "prospective" application of Northern Pipeline and Reminc properly makes those decisions applicable to a case, such as the instant one, still pending on appeal, and that such a case is to be controlled by the law in effect when it is finally decided. See, e.g.: United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801); Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969); Bradley v. School Board of City of Richmond, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). But, whatever limitations are imposed upon "prospective" application of judicial

decisions, the demand of the Constitution for an Article III judge to decide the instant case remains unaffected and is controlling.

And, of course, the circumstance that Twin Parks did not mount its jurisdictional attack until it filed its brief in the court of appeals is not significant, since the issue of subject matter jurisdiction, which can neither be created or destroyed by agreement or consent of the parties or of a party, is always open and should be noticed by the court, even if raised for the first time on appeal. See Capron v. Van Noorden, 2 Cranch 126, 2 L.Ed. 229 (1801); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 164, 60 S.Ct. 153, 84 L.Ed. 167 (1969). See also Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), holding that although this Court does not

ordinarily address issues other than those fairly comprised within questions presented by petitions or cross petitions for certiorari, an exception exists with regard to the question of jurisdiction, which cannot be ignored, even if not raised by the parties. Twin Parks suggests that the inquiry as to jurisdiction is always appropriate at any stage of a case in a court of the United States. That inquiry in this case, Twin Parks respectfully urges, was answered erroneously by the court of appeals. That error should not be permitted to remain uncorrected. The issue involved is important in administration of the bankruptcy law, is pervasive, since it potentially affects all pre-Reform Act cases in which bankruptcy judges decided state law claims, pertains to application of a fundamental tenet of the constitutionally mandated structure and operation of the federal judicial

system, viz. the requirement of an Article III judge to exercise the judicial power of the United States, is (as far as Twin Parks knows) a matter of first impression in this Court with respect to application of Article III requirements to a pre-Reform Act case and warrants the intervention of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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February 7, 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

November 9, 1983

TO: Benjamin Lipsitz, Esq.

Alan H. Kent, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 82-1459 this date.

The Court's opinion is enclosed.

* * * * *

WILLIAM K. SLATE, II

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1459

In Re: Twin Parks Limited Partnership

N.S.C. Contractors, Inc.

Appellee.

v.

Twin Parks Limited Partnership,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Senior District Judge. N-81-2047

Argued: June 9, 1983

Decided: November 9, 1983

Before SPROUSE, ERVIN, and CHAPMAN, Circuit Judges

Benjamin Lipsitz for Appellant; Alan H. Kent (Schnader, Harrison, Segal & Lewis on brief) for Appellee.

SPROUSE, Circuit Judge:

Twin Parks Limited Partnership appeals from the district court's judgment affirming the banruptcy judge's decision in favor of N.S.C. Contractors, Inc. Twin Parks contends that the bankruptcy judge lacked jurisdiction to decide N.S.C.'s state law claim of breach of contract. Twin Parks also challenges the award of post-bankruptcy petition interest to N.S.C., and assigns numerous other errors. Finding merit in the appellant's challenge to the award of interest but none in its other assignments of error, we affirm the district court's decision except that part awarding post-petition interest. We reverse that part of the decision and reduce the money judgment accordingly.

Twin Parks filed a Chapter XII petition on June 14, 1979, seeking a real

property arrangement under the Bankruptcy Code.[1] Pending at the time were two proceedings initiated by N.S.C. Contractors to resolve a contractual dispute with Twin Parks over monies owed for work performed on its residential apartment project. One of the proceedings was before the American Arbitration Association, which was designated by contract to handle disagreements. The other proceeding was pending in the Circuit Court for Worcester County, Maryland, and involved N.S.C.'s claim to a mechanic's lien against buildings it had constructed for Twin Parks. The bank-

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[1] The petition was filed five months before the effective date of the Bankruptcy Reform Act of 1978 (Reform Act), 11 U.S.C. § 1 et seq. (1979 & Supp. 1983) It was processed under Section 403(a) of the Reform Act, which essentially states that cases commenced before the effective date of the Act will be controlled by pre-1979 law. 11 U.S.C. prec § 101 (1979 & Supp. 1983)

ruptcy judge issued a Rule 12-43[2] order after Twin Parks' Chapter XII petition was filed, staying both the arbitration and state court proceedings.

N.S.C. subsequently filed a complaint with the bankruptcy court seeking to lift the stay order or, alternatively, asking the court to allow its claim against the debtor. Twin Parks answered, filed a counterclaim and specifically requested the court to take jurisdiction over the dispute. It demanded a jury trial on all issues pertaining to the state law breach of contract claim. This demand was denied and the bankruptcy judge heard and decided the case without a jury. The

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[2] Rule 12-43 of the Rules of Bankruptcy Procedure provides: "A petition filed under . . . [this section] shall operate as a stay of the commencement or the continuation of any court or other proceedings against the debtor."

trial began on July 29, 1980, was delayed several times due to the illness of Twin Parks' major shareholder and was finally concluded in favor of N.S.C. on May 9, 1981. Twin Parks appealed the adverse judgment to the district court which reviewed the record and affirmed the bankruptcy judge's order on April 20, 1982.

Twin Parks' principal argument for reversal is jurisdictional. It argues that the bankruptcy judge, who was clearly not an Article III judge,[3] had no power to adjudicate contract claims arising entirely under state law. It points to Northern Pipeline Constr. Co. v. Marathon Pipeline Co., _____ U.S. _____, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) and to this court's even more

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[3] Article III, § 1 of the United States Constitution describes the distinguishing characteristics of an Article III judge.

recent decision in 1616 Reminc Ltd. Partnership v. Atchinson & Keller Co., 704 F.2d 1313 (4th Cir. 1983) for support.[4]

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[4] In Northern Pipeline, the Supreme Court ruled that Section 241(a) of the Bankruptcy Reform Act of 1978 impermissibly granted inherently judicial power to a non-Article III judge. It declined to consider, however, whether the pre-1978 practice of referring wholly state law claims to bankruptcy judges (formerly referees) similarly runs afoul of the constitution, noting only that there appear to be some significant differences between the power exercised by pre-Reform Act judges and the newly created bankruptcy judges. Northern Pipeline 73 L.Ed.2d at 620-621 n. 31.

The case before us calls into question the practices followed under the law existing previous to the Bankruptcy Reform Act. Reminc, like the present case, involved a challenge to pre-Reform Act practices and procedures. For this reason, this court's recent decision in Reminc has more specific application to the instant case than Northern Pipeline. In Reminc, we ruled that Rule 810 of the Rules of Bankruptcy Procedure "unconstitutionally vested the non-Article III bankruptcy [judge] with too great a measure of the judiciary power of the United States." 704 F.2d at 1318.

The jurisdictional argument Twin Parks now raises for the first time would have merit if made by a litigant not voluntarily before the court and whose action was not underway on the effective dates of the Northern Pipeline and Reminc decisions. Northern Pipeline and Reminc obviously provide support for its arguments that pre-Reform Act bankruptcy judges, acting under the supervision of Article III District Courts, cannot decide claims arising entirely under state law without the consent of the parties. Northern Pipeline, 73 L.Ed.2d at 625; Reminc, 704 F.2d at 1318. The Reminc Court's discussion was particularly supportive, stressing the point that pre-Reform Act judges are not sufficiently adjunct to the district court to justify their exercise of federal

judicial power[5] over state disputes. Twin Parks, however, cannot benefit from these recently announced decisions because they were intended to operate prospectively. Twin Parks' claims were fully litigated by the bankruptcy judge, affirmed by the district court and pending on appeal well before the effective dates of the Northern Pipeline and Reminc decisions.

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[5] The Reminc Court held that Rule 810 of the Rules of Bankruptcy Procedure, which directs the district court to uphold the bankruptcy judge's factual findings unless clearly erroneous, impermissibly invested the non-Article III bankruptcy judge with judicial power to decide state law claims. All cases decided after the promulgation of Rule 810 would have suffered from the same jurisdictional defect if the rule were applied retroactively. However, those cases, like the one before us now, are left undisturbed because Reminc applies only to litigants whose cases are reviewed by a district court after December 24, 1982. 704 F.2d at 1319.

The Supreme Court in Northern Pipeline stated:

> In the present case, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Article III bankruptcy judges presents an unprecedented interpretation of Article III. It is equally clear that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. . . .We hold, therefore, that our decision shall apply only prospectively.

73 L.Ed.2d at 626. (emphasis added) In Reminc, we agreed with the applellant that the bankruptcy judge lacked jurisdiction, but emphasized that the decision must be applied prospectively as to all other litigants.[6] 704 F.2d at 1319

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[6] The appellant in Reminc noted the jurisdictional defects in the dis-

Twin Parks contends nevertheless that only cases which have exhausted appeals are foreclosed by a "prospective" change in the law. It argues further that an appellate court is bound to apply the law in effect at the time it renders a decision--in this case the jurisdictional rule established by Northern Pipeline.

This argument oversimplifies the controlling rule. It is generally true that "a change in the law will be given effect while a case is on direct review," Linkletter v. Walker, 381 U.S.

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trict court's handling of its case well before Northern Pipeline was decided. We thought it inequitable to deny Reminc the benefit of its foresight in pressing the jurisdictional argument to conclusion, but no such equitable concerns are involved here. Twin Parks failed to raise the jurisdictional argument in its appeal until after Northern Pipeline was decided. At that point, it simply restructured its appeal to take advantage of the Supreme Court's later announced decision.

618, 627, 85 S.Ct. 1731, 14 L.Ed.2d 601, 607 (1965). Tribunals announcing new principles of law, however, qualify their retroactivity in differing ways, and the new principles' effect on cases then existing in various stages of litigation differ accordingly. See United States v. Johnson, _____ U.S. _____, 102 S.Ct. 2579, 72 L.Ed. 2d 202 (1982); Linkletter, 381 U.S. at 628; Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932); Lester v. McFaddon, 415 F.2d 1101 (4th Cir. 1969).[7] Ultimately, the prospective or retrospective ef-

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[7] See also Chevron Oil Co v. Huson, 404 U.S. 97 (1971), for the factors a court should consider in deciding whether to make a new rule of law prospective or retroactive. Until recently, the Chevron Oil factors guided courts in deciding the retroactive effects of criminal and civil cases. The decision in United States v. Johnson, _____ U.S. _____, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), however, suggests a different inquiry is appropriate for criminal cases.

fects of a new rule depend upon the enunciating court's intention. A court may decide that judicial policy is furthered by making a new principle of law operate completely retroactively, thereby affecting even decisions which were otherwise finalized. See, e.g., Ivan v. City of New York, 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972). As an intermediate position, a court may conclude that its decision should be retroactive to all parties on direct appeal, Johnson, 73 L.Ed. 2d at 222, or it may choose a narrower course and apply its decision only to the case in which the new principle is announced and to those cases initiated in the future. See, e.g., Kirchberg v. Feenstra, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981). Finally, a court may make its decision purely prospective, "denying the benefit of the new rule even to the parties before the court." Johnson 73 L.Ed.2d

at 210.

Where the enunciating court fails to identify the limits of its decision, later courts often assume that the new rule applies to cases pending on appeal. See, e.g., United States v. Fitzgerald, 545 F.2d 578, 582 (7th Cir. 1976). Were we faced with this situation, then, Twin Parks' argument concerning Northern Pipeline and Reminc's applicability to its own case probably would succeed. The Supreme Court in Northern Pipeline and this court in Reminc, however, have stated clearly that their decisions are to be applied prospectively. Northern Pipeline, 73 L.Ed.2d at 626; Reminc, 704 F.2d at 1319. These direct and unqualified expressions mandate that later tribunals should not apply the new jurisdictional rules to claims, such as Twin Parks, which were fully litigated by the bankruptcy judge and the district court and were pend-

ing on appeal before the effective date of Northern Pipeline and Reminc.

II

We agree with Twin Parks' argument, however, concerning the award of interest and hold that the bankruptcy court and the district court committed error in allowing N.S.C. Contractors prejudgment interest beyond the time when the Chapter XII petition was filed. The rule concerning the award of interest against a debtor in bankruptcy was summarized by the Supreme Court in Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1946):

> As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate.

Id. at 163 (quoting Thomas v. Western Car

Co., 149 U.S. 95, 116-117, (1893)). The Vanston court made it clear that while the award of pre-petition interest normally is governed by state law, "[when] and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law." Id.

Vanston's vitality has not been diminished.[8] This court has recognized its guiding principles in ruling that interest should not be awarded past the point a bankruptcy petition is filed, ab-

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[8] See, e.g., Nicholas v. United States, 384 U.S. 678 (1966); Brunning v. United States, 376 U.S. 358 (1964); Debentureholders Protective Comm. of Continental Investment Corp. v. CIC, 103 S.Ct. 192 (1982); In re Walsh Constr. Co., 669 F.2d 1325 (9th Cir. 1982); In re Petite Auberge Village, Inc., 650 F.2d 192 (9th Cir. 1981).

sent exceptional circumstances. See Smith v. Robinson, 343 F.2d 793 (4th Cir. 1965); United States v. Harrington, 269 F.2d 719 (4th Cir. 1959). These exceptional circumstances are limited to cases where: (1) the debtor claiming bankruptcy protection later proves to be solvent, Smith v. Robinson, supra; (2) the property of the debtor continues to earn money, id.; (3) the debt is not one discharged by bankruptcy, Brunning v. United States, 376 U.S. 358 (1964). Other courts have alsoallowed post-petition interest where the creditor's claim is secured by property of sufficient value to pay both the principal of the debt and accrued interest. See, e.g., In re Walsh Construction Co., 699 F.2d 1325 (9th Cir. 1982).

Neither the district court nor N.S.C. on appeal attempted to justify the award of post-petition interest under any of these exceptions. The award of interest

past June 14, 1979, the filing date of Twin Parks' Chapter XII petition, was thus inappropriate.

The district court's award of interest past June 14, 1979, is reversed and the money judgment reduced accordingly. That portion of the interest award attributable to the pre-petition period is governed by state law and remains undisturbed. Finding no error in the other district court actions, all other portions of its judgment are affirmed.

REVERSED IN PART
AFFIRMED IN PART

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE

TWIN PARKS LIMITED PARTNERSHIP

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N.S.C. CONTRACTORS, INC.

v.

TWIN PARKS LIMITED PARTNERSHIP

(On Appeal from the United States Bankruptcy Court for the District of Maryland Case No. 79-01029-L)

CIVIL NO. N-81-2047

MEMORANDUM

This matter comes before the Court on appeal from the judgment order of the bankruptcy court (Lebowitz, J.) dated May 14, 1981, following trial by the bankruptcy court of the breach of contract claim filed by N.S.C. Contractors, Inc. (hereinafter "NSC") against the debtor, Twin Parks Limited Partnership (hereinafter "Twin PArks"). Judgment was entered in favor of NSC and against Twin Parks in the amount of $36,711.11, with inter-

est thereon at the legal rate of six percent per annum from October 13, 1978 through June 30, 1980, and ten percent per annum thereafter, and costs in the amount of $1,271,45. On May 19, 1981, Twin Parks filed its notice of appeal.

1. The Right to a Jury Trial on Twin Parks' Counterclaim

As its first challenge on appeal, Twin Parks raises error in the refusal of the bankruptcy court to grant a jury trial on its counterclaim.

Twin Parks filed a counterclaim in the bankruptcy proceeding on November 15, 1979, alleging that NSC materially breached the agreements between the parties by its failure to perform in a timely manner as to those units actually constructed, failure to perform in a workmanlike manner, and failure to complete the total construction project contemplated by the agreement of the parties. The counter-

claim sought dismissal of NSC's complaint and money damages and contained a demand for a jury trial. The bankruptcy court denied Twin Parks' request for jury trial for the reason that the present case was brought under the Act, and that the Bankruptcy Act provided for jury trial, as a matter of right, in two limited instances; namely, where the bankruptcy petition is an involuntary one, and where a non-dischargeable issue exists. Additonally, the Court stated that a jury trial may also be had where both parties consent, but that, in this instance, the claimant, NSC, did not consent.

In support of its position, Twin Parks relies on the Supreme Court's decisions in Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) and Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). Appellant contends that both the complaint filed by NSC and its counterclaim raise solely

legal issues and seek solely monetary relief.

Appellee NSC urges that because proceedings before the bankruptcy court are equitable in nature, the right to a jury trial is non-extant. Relying on Katchen v. Landy, 382 U.S. 323 (1966), appellee states that a counterclaim filed by the debtor or trustee against a claimant of the estate falls within the summary jurisdiction of the bankruptcy court, where such counterclaim is related to the main claim.

This Court aligns itself with the decision of the bankruptcy court that Twin Parks was not entitled to a jury trial on its counterclaim, and hereby affirms that decision.

There is no dispute as to the correctness of Twin Park's broad statement that the counterclaim raises issues of law and, consequently, the Seventh

Amendment would apply. However, the nature of the forum and the nature of the counterclaim, in this instance, determine whether or not the Seventh Amendment applies.

First, as to the forum, the Supreme Court has stated that:

> [I]n cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate which would ordinarily be pure cases at law, and in respect of their facts triable by jury; but, as belonging to the bankruptcy court proceeding, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods.

Barton v. Barbour, 104 U.S. 126 (1888).

In Katchen v. Landy, supra, the Supreme Court resolved a conflict among the circuits in relation to the power of the bankruptcy court to order surrender of voidable preferences as a part of its summary jurisdiction to allow or disallow

claims of creditors in the ordinary course of administration of the bankrupt's estate. The creditor in that case argued that the trustee could recover the voidable preferences only by resort to plenary proceedings, and that the creditor would have the right to demand a jury in such a proceeding.

The Supreme Court acknowledged that Congress had not expressly authorized the bankruptcy court to order the surrender of the preferences as a part of its summary jurisdiction over the claims of creditors against the estate. Nevertheless, the Court concluded that, in light of Congressional intent to provide an efficient forum to administer the bankruptcy laws, summary adjudication of the preference matter was an integral part of the bankruptcy court's summary disposition of the creditors' claims. In so holding, the Court stated that the holdings of Dairy

Queen and Beacon Theatres, on which appellant relies, were not applicable because of the special statutory scheme enacted by Congress to ensure efficient and expeditious handling of bankruptcy matters.

The Court also acknowledged that the Bankruptcy Act, 11 U.S.C. § 42, conferred concurrent jurisdiction on state and federal courts to entertain plenary suits for the recovery of preferences. However, the Court commented that the language of the Act required resort to plenary proceedings only in those instances where such proceedings are necessary. Accordingly, the Court construed the kanguage of the Act to contemplate non-plenary proceedings to recover voidable preferences. 382 U.S. at 331.

Specifically addressing the petitioner's Seventh Amendment claim, the Supreme Court stated that there is no right to a jury trial in connection

with a proceeding filed by the trustee to object to claims of creditors of the bankrupt's estate. The Court reasoned, therefore, that a petition seeking affirmative relief in the nature of return of a voidable preference, when it arises as part of the process of allowance and disallowance of claims, is triable in equity.

A bankruptcy court, in the exercise of discretion, may decline to accept jurisdiction, such as where an issue of the court's jurisdiction is raised, or where the court is unable to afford complete relief to the interested parties. In re Tyne, 261 F.2d 249, 253 (7th Cir. 1958); In re Terrace Lawn Memorial Gardens, 256 F.2d 398 (9th Cir. 1958) and Sulmeyer v. Pfohlman, 329 F.2d 915 (9th Cir. 1964); Ford v. Magee, 160 F.2d 457 (2d Cir. 1947), respectively. Further, plenary adjudication may be preferable to summary adjudication where complex

legal snd factual issues underlie the ultimate validity of the claims of various individuals to the debtor's property, In re Wonderbowl, Inc., 456 F.2d 954 (9th Cir. 1972).

The courts have generally recognized that a creditor who files a claim in the bankruptcy court impliedly consents to be sued on counterclaim arising out of the same transaction. Alexander v. Hillman, 296 U.S. 222 (1935); In re Carnell Construction Corp., 424 F.2d 296 (3rd Cir. 1970), cert. denied sub nom. Masterson v. Valley National Bank of Long Island, 400 U.S. 828 (1970); Columbia Foundry Co. v. Lochner, 179 F.2d 630 (4th Cir. 1950); In re Beasley-Gilberts, Inc., 285 F. Supp. 359, 361 (S.D.N.Y. 1968).

The counterclaim filed by Twin Parks is indisputably interwoven with NSC's claim for monies due and owing pursuant to the agreements between the parties per-

taining to the construction of the apartment complex. The Court cannot accept Twin Parks' proposition that "[t]he validity of [its] counterclaim was independent of the 'allowability' of NSC's claim." The events complained of in the counterclaim are the same events out of which NSC's claim arose. Twin PArks' contention is plainly wrong and contrary to elementary principles of civil practice and procedure. See 6 Wright and Miller, Federal Practice and Procedure: Civil, §§ 1409 (1971 ed.).

On July 26, 1979, NSC filed its complaint to modify the Rule 12-43 stay in order to proceed to adjudication of its claim against the bankrupt, either in the arbitration proceeding or the mechanic's lien proceeding theretofore commenced by it against Twin PArks. In the alternative, NSC sought to have its claim adjudicated in an adversary proceeding in the bank-

ruptcy court. Part VII of the Bankruptcy Rules pertain to adversary proceedings instituted by a party before a bankruptcy judge to recover money or property. Rule 713 governs the filing of counterclaims and cross-claims and is generally patterned after Rule 13 of the Federal Rules of Civil Procedure.

In Columbia Foundry Co. v. Lochner, supra, the Fourth Circuit held that the bankruptcy court, sitting in equity jurisdiction, had jurisdiction to entertain the trustee's counterclaim against the creditor who filed a claim against the bankrupt's estate. The trustee in that case, as does the debtor here, counterclaimed that the defective performance of the creditor caused financial ruin to the bankrupt's business and its ultimate destruction.

In contrast, it has been held that where the debtor files a petition

seeking relief from the automatic stay and no other relief, the bankruptcy court lacks jurisdiction to entertain certain defenses and claims raised by the debtor directed to the validity of the creditor's claim. Matter of Essex Properties, Ltd., 430 F. Supp. 1112 (N.D. Cal. 1977); In re Overmeyer Co., 2 Bankr.Ct.Dec. 992 (S.D.N.Y. 1976). The rationale for this rule is that a request for relief from an automatic stay is not a "claim." Consequently, there is no predicate claim oto support the assertion of a counterclaim. In re Groundhog Mountain Corp., 1 Bankr.Ct.Dec. 923 (S.D.N.Y. 1975).

The principles of law established and cited in the aforegoing cases are applicable here and lead to the conclusion that Twin Parks' is not entitled to a plenary trial by jury on the matters raised in its counterclaim. The claims

raised by Twin Parks do not fall within the two categories of claims where jury trial may be had as a matter of right under the Bankruptcy Act. Further, the counterclaim is compulsory in nature and, by virtue of Rule 713 of the Banlruptcy Court Rules, is assertible by the debtor in the adversary proceeding commenced by the creditor.

Accordingly, the decision of the bankruptcy court denying Twin Parks' request for a jury trial on its counterclaim hereby is affirmed in all respects.

2. The Supplemental Agreement dated February 6, 1978

Next, appellant Twin Parks alleges error in the ruling by the bankruptcy court that the "supplemental agreement" dated February 8, 1978, between NSC and Maurice P. Freedlander, the general partner of Twin Parks, was the agreement of the partnership and not of Mr. Freedlander, in-

dividually.

Essentially, appellant contends that the supplemental agreement is that of Freedlander because it was executed by him with no reference to his representative capacity. Additionally, Twin Parks contends that the substance of the agreement is contrary to the interests of the partnership because it converted the stipulated-sum agreement into a cost-plus agreement, which was decidedly less favorable to the partnership.

The findings of the bankruptcy court pertaining to the contract documents are contained in the transcript of the May 9, 1981 hearing at pages 69 through 72. The court found that the parties had entered into a valid and enforceable contract dated March 7, 1977, which subsequently had been modified by the contract dated February 6, 1978. Further, the court found that the February 6, 1978 standard

AIA agreement had been modified by the supplemental agreement of even date. The supplemental agreement was an updated version of an earlier agreement of March, 1977, which provided for a sharing of any cost savings which might be realized between NSC and Mr. Freedlander. A significant time lapse had occurred between the March, 1977 agreements and the financing commitment which Twin Parks eventually obtained from Metropolis Building and Loan Association. The court noted that during this period, there had been an increase in construction costs. As a result, the March 7, 1977 ALA contract and the supplemental agreement were altered, and the modified agreement was embodied in the AIA contract and the supplemental agreement both dated February 6, 1978.

The court found that these agreements, construed as a whole, formed

the basis of the understanding between the parties. The parties performed pursuant to these agreements and, at no time, had the agreements been repudiated by either during the period of time relevant to this inquiry.

The court attributed no significance to the fact that Mr. Freedlander had executed the supplemental agreement in his own name, concluding that at all times, Mr. Freedlander was acting as an agent of the partnership to be formed or in existence, and/or on behalf of the corporate general partner, the Moreland Company.

The Court hereby affirms the ruling of the bankruptcy court that at all relevant times, Mr. Freedlander was acting in his fiduciary capacity as an agent of the Twin Parks Partnership and that the supplemental agreement of Feb-

ruary 6, 1978 was, in fact, the agreement of the partnership.

Twin Parks has offered no evidence to the contrary, except to intimate that the cost-plus basis and the sharing of cost savings provisions of the supplemental agreement were not favorable to the partnership, or that there might have been a conflict of interest. Appellant relies on no legal principle in support of its position and, in any event, it could not. The AIA contract of March, 1977, clearly reveals that Mr. Freedlander was acting as an agent of the disclosed principal to be formed. As a general partner of Twin Parks, he was personally liable under the basic agreements and the supplemental agreement. His authority to act on behalf of the partnership, in connection with the supplemental agreement, has not been questioned by Twin Parks. Further,

there is no evidence that the partnership, once formed, refused to ratify or affirm the basic agreement between Twin Parks and NSC or the supplemental agreement executed sontemporaneously therewith. The fact that the cost-plus term of the agreement between these parties did not prove beneficial to Twin Parks does not undermine the fact that the contract was at all times enforceable by both NSC and Twin Parks.

Accordingly, Twin Parks is estopped from challenging the validity of the supplemental agreement of February 6, 1978 in this proceeding, and the decision pf the bankruptcy court stands as affirmed.

3. The "Extra" Work Performed by NSC

Twin Parks raises error in the ruling of the bankruptcy court that it was liable, on a cost-plus basis, for

the extra work performed by NSC; namely, the construction of the fence and the site fill, and the amount of the performance bond premium. It contends that the court improperly applied a cost-plus basis, rather than a quantum meruit standard of compensation with regard to these extras and, in any event, the evidence was insufficient to sustain the amount of the costs awarded. The findings of the bankruptcy court are set out in the transcript of the May 9, 1981 hearing at pages 72 through 82.

The Fence

The court found that the fence had not been included in the list of work to be performed by NSC in Article i of the qgreements of March 7, 1977 and February 6, 1978 (hereinafter the "operative agreements"). Additionally, it found that the specifications for the fence had not been referred to in, or incorporated by the

terms of Article 6 of the agreements.

NSC's project manager, Patrick Newman, testified that he first became aware of the requirement of a fence during a conversation he had with a City of Salisbury building inspector in February, 1978. Subsequently, Mr. Newman and Mr. Freedlander unsuccessfully attempted to persuade the City Council to remove the requirement. The court specifically found, based on Mr. Newman's testimony, that Mr. Newman had advised Mr. Freedlander that NSC would not absorb the cost of erecting the fence. Mr. Freedlander replied that, if the fence was required, then NSC should build it and that Mr. Freedlander would try to find a way to pay for the fence.

The bankruptcy court noted that, as early as the issuance of the first progress report on April 3, 1978, the fence was included as an anticipated extra item

at an approximate cost of $10,000. Subsequently, the fence appeared as an extra cost on progress reports numbers 2 and 3. The court found that Mr. Freedlander made no objection to this anticipated extra item at any time. Mr. Freedlander admitted on cross-examination that he instructed NSC to build the fence, but that he never agreed to pay for it.

The court concluded, based on all the evidence, that NSC was entitled to compensation for its services in connection with the construction of the fence.

The Fill Dirt

The court found that none of the agreements required the land fill work to be perormed by NSC, and, further, that Article 1 of the contracts specifically excluded this work from the workto be performed by NSC.

Mr. Arnold of NSC testified that the grading of the construction site was

to be performed by other contractors. The court found that the express terms of the contract were consistent with this testimony and Mr. Arnold's understanding. Mr. Newman, project manager, testified that when NSC subsequently discovered that there was insufficient fill dirt on the site, Mr. Freedlander told him to get the fill dirt and that Mr. Newman subsequently arranged to bring the fill dirt onto the site.

The court found that Mr. Freedlander knew, as early as April, 1978, that the land fill work would constitute an extra item at an aticipated cost of approximately $5,000. The work was thereafter incorporated as an extra in progress reports numbers 2 and 3. The court found that Mr. Freedlander voiced no objections and that he did nothing in relation to this extra work.

The court concluded from all of the evidence that the land fill work was not a part of the original contracts, that Twin Parks expressly requested NSC to perform this service, and that NSC was entitled to compensation for its services in connection with developing the construction site.

The Completion Bond

The court found that none of the operative agreements included the cost of the completion bond premium as part of the contract price to be paid to NSC but, rather, found to the contrary, that the contracts specifically excluded the cost of the bond premium. The language of Article 3 of the contracts excludes from the contract sum the cost of performance and labor and material payment bonds, which items were to be included in the schedule of soft costs to be submitted by Twin Parks to the lender.

Mr. Freedlander testified that the cost of the bond premium may have been included in a "slush" fund for miscellaneous items. He testified further that other items listed together with the bond premium as soft costs had, in fact, been paid by Twin Parks. The court found that Mr. Freedlander was aware of the extra cost of the bond premium as of May 17, 1978, when he received the second progress report. As with the above-noted items, Mr. Freedlander voiced no objection to this extra item and, in fact, attempted to obtain additional funds from the lender to underwrite the cost of the premium.

Based on all of the evidence, the court concluded that the cost of the bond premium was not covered by the contract sum to be paid to NSC and that NSC was entitled to be compensated for obtaining the completion bond.

The court additionally found that, although the agreements between the parties required change orders to be made in writing, the parties had established a practice of making oral change orders.

The rulings of the bankruptcy court holding Twin Parks laible, on a cost-plus basis, for the extra work performed by NSC and the amount of the performance bond hereby are affirmed.

The operative agreements were silent as to NSC's obligation thereunder to erect the fence. Inasmuch as the contracts are unambiguous on their face, parole evidence is not admissible to prove what the parties had intended by way of antecedent or contemporaneous negotiations. The rule, however, does not preclude introduction of evidence as to any subsequent modification of those agreements by the parties. Evergreen Amusm't

Corp. v. Milstead, 206 Md. 610 (1954); Saul v. McIntyre, 190 Md. 31, 36 (1947). 4 Williston on Contracts, § 623 (3d ed. 1961).

In the light of the evidence adduced at trial and the court's findings, the court properly concluded that the conduct of the parties manifested their mutual assent to this additional undertaking and to the payment of reasonable compensation therefor. See Maryland National Bank v. United States, 227 F. Supp. 504 (D.Md. 1964); 12 Williston on Contracts, § 1480 (3d ed. 1970).

Accordingly, the court correctly held Twin Parks liable for the extra work. The proper measure of compensation to NSC will be discussed hereinafter.

The bankruptcy court correctly concluded that the written agreements between the parties did not obligate NSC

to grade the construction site. The contracts, unambiguous on their face, state that the site was to be graded "by others," and expressly excepted "site development" from the items of work to be undertaken by NSC.

The court properly concluded, from the evidence adduced at trial, that an implied contract had arisen between the parties, or that they had effected a modification of their original undertakings.

The bankruptcy court properly construed the language of the operative agreements to exclude the cost of the bond premium from the contract sum to be paid to NSC and to include the bond premium as part of the soft costs to be submitted by Twin Parks to the lender. Again, the conduct of the parties manifested mutual assent to this undertaking by NSC for which NSC has the right to compensation.

Recovery under the principle of quantum meruit is the applicable rule in situations, such as this one, where changes in the work to be performed under a construction contract have been ordered. Seybolt v. Baber, 203 Md. 20, 26-27 (1952); House v. Fissel, 188 Md. 160, 162-63 (1946); 12 Williston on Contracts, § 1459A (3d ed. 1970). The measure of recovery under quantum meruit is the reasonable value of the services performed by the plaintiff. In this regard, the contract price may be evidence of reasonable value, but is not the absolute measure of the value. United States v. Algernon Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973); 12 Williston on Contracts, § 1485 (3d ed. 1970).

In this case, NSC proffered the amount of its damages based on the formula fixed in the supplemental agreement of February 6, 1978, which agreement has been held to be valid and binding. It is evi-

dent from the evidence that Twin Parks considered the costs of the fence and the performance bond to be reasonable for it had attempted to obtain financing from the lender for these items. In any event, Twin Parks never objected to the amount of these extras although it had knowledge thereof. In point of fact, Twin Parks has produced no evidence that these costs are not reasonable but, rather, continues to dispute the question of its liability for the extra work performed by NSC.

The evidence produced on the matter of compensation to NSC was sufficient for the bankruptcy court to have found that the costs charged by NSC were equivalent to the reasonable value of such services. Accordingly, the Court hereby affirms that portion of the bankruptcy court's ruling.

4. Exclusion of the Testimony of Stanley D. Kolb, Jr.

As the next assignment of error, Twin Parks contends that the bankruptcy court abused its discretion by refusing to allow the testimony of its proposed witness, Stanley D. Kolb, Jr.

This Court is unable to ascertain the significance, if any, of the court's exckusion of this testimony. Counsel for Twin Parks, Mr. Lipsitz, candidly admitted that he did not know what the testimony of the witness would be. In fact, he represented to the court that he did not even know whether the testimony would be favorable to his client or to NSC.

Rule 43 of the Federal Rules of Civil Procedure requires that the party whose evidence is excluded make an offer of proof in order to allow the trial court to reevaluate the decision to exclude the evidence or the testimony. In this instance, it is clear that counsel for Twin

Parks could not proffer to the court the substance of the witness' expected testimony.Further, it was not even clear whether the witness was qualified to render an expert opinion as to the condition of the premises and the work performed by NSC. See Fortunato v. Ford Motor Company, 464 F.2d 962, 967 (2d Cir. 1972), cert. denied, 409 U.S. 1038 (1973).

Under these circumstances, the Court is unable to hold that the exclusion of the testimony substantially prejudiced Twin Parks. Palmer v. Hoffman, 318 U.S. 109 (1943); 9 Wright and Miller, Federal Practice and Procedure: Civil § 2414 (1971 ed.). Furthermore, the court properly excluded the testimony for the reason that it would likely be cumulative of that testimony already of record as to the condition of the units. See Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. ;980).

The trial of this matter had been marked by a series of continuances because of Mr. Freedlander's health problems. In order to have prevented manifest injustice to NSC, it would have been necessary for the court to grant another continuance to allow NSC an opportunity to depose Mr. Kolb. Under all of these circumstances, where the witness was a late-hour on and where the substance of the expected testimony was unknown, refusal to receive it was clearly warranted and a proper exercise of the court's discretion. See Crompton-Richmond Co., Inc. Factors v. Briggs, 560 F.2d 1195 (5th Cir. 1977); Compton v. United States, 334 F.2d 212 (4th Cir. 1964).

5. Taxation of Deposition Costs and Allowance of Pre-judgment Interest

Twin Parks alleges error in the award of prejudgment interest and the tax-

ation of the costs of depositions taken by NSC. Appellant states that NSC made minimal use of the deposition of Mr. Freedlander at trial and made no use at all of the deposition testimony of the other two individuals. It contends that the award of prejudgment interest was contrary to the general rule that interest on the obligation of a debtor ceases to accrue as of the date of filing the bankruptcy petition.

The Freedlander deposition was used extensively by NSC at the pretrial stage in preparation of the motions for summary judgment, and at the trial to impeach the witness' testimony. Accordingly, the bankruptcy court properly taxed this item of cost against the losing party. The other two depositions, although not used at trial, likewise may be taxable as costs. The trial court has broad discretion to allow or disallow items of

cost. 28 U.S.C § 1920; Advance Business Systems & Supply Co. v. SCM Corporation, 287 F.Supp. 143 (D.Md. 1968),aff'd. 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

In this instance, the bankruptcy court acted within the confines of its discretionary power, and the award was proper.However, in the light of appellee's willingness to diminish the award of costs in an amount reflecting the expenses of these two depositions, the judgment order will be modified accordingly.

The judgment award in favor of NSC was in the amount of $36,711.11, with interest thereon from October 13, 1978 at the rate of six percent per annum through June 30, 1980 and at the rate of ten percent per annum thereafter.

As the Court heretofore has held, the award to NSC was appropriate on a theory of implied contract, or a

modification of the original agreements between the parties. The amount of NSC's claim was liquidated and, consequently, prejudgment interest at the existing legal rate was appropriate. See Newton v. American Surety Company of New York, 329 F.2d 299 (4th Cir. 1964); 10 Wright and Miller, Federal Practice and Procedure: Civil § 2664 (1973 ed.). In this regard, the statutory rate of interest in Maryland was six percent through June 30, 1980, and increased to ten percent thereafter. MD. COM. LAW CODE ANN. § 12-102.

Interest on a money judgment rendered in civil proceedings is mandatory pursuant to 28 U.S.C. § 1961, and runs from the date of entry of judgment. Bankruptcy proceedings are civil proceedings for purposes of this rule. Woolfson v. Doyle, 180 F.Supp. 86 (S.D.N.Y. 1960). Pursuant to Maryland law, the legal rate of interest on a money judgment is ten

percent per annum. MD. CTS. & JUD. PROC. CODE ANN. § 11-107 (1980 replace. part).

Accordingly, the assessments of prejudgment interest on the clai of NSC and judgment interest on the award of the bankruptcy court were proper. However, in light of appellee's willingness to accept a six percent prejudgment rate of interest, the judgment order will be modified accordingly.

6. Dismissal of the Counterclaim Filed by Twin Parks

Twin Parks challenges the dismissal of its counterclaim by the bankruptcy court on the ground that the court ignored evidence that NSC had breached the contract by its delay in performance, failure to perform in a workmanlike manner, and its failure to complete the remaining thirty townhouse units.

The findings of fact of the court on the counterclaim are set forth

in the transcript pf the May 9, 1981 hearing at pages 89 through 99. These findings are binding upon the Court unless they are clearly erroneous. Rule 810 of the Bankruptcy Court Rules; In re Friedman, 436 F.Supp. 234 (D.Md. 1977).

The court dismissed the counterclaim on the basis of its findings that the delay in completion of the sixteen units had been occasioned by factors not within the control or foreseeability of NSC; namely, severe weather conditions, delay in order to complete the site development, stop orders issued by the City of Salisbury because of the requirements of the fence construction and fire blocking, delay by Mr. Freedlander in obtaining the carpeting for the units and delay of Delaware Power in making the electrical hook-ups. The court found that all requisitions for payment to NSC had been approved and that all payments under the

contract had been made.

Construction of the sixteen units commenced in February, 1978, and was to have been completed in May or June of that year. Occupancy permits were issued in October, 1978. The court found that at least a one-month delay had been occasioned by the need to develop the construction site. As was addressed in a preceding portion of this memorandum, NSC was not obligated to perform this work; rather, the contract provided that the work was to be done by others. The fault in this regard was that of Twin Parks and, consequently, delay in performance was properly excused. Schneider v. Saul, 224 Md. 454, 460 (1960); Iron Clad Mfg. Co. v. Stanfield, 112 Md. 360 (1910).

Moreover, the delay due to the withholding of the permits by the city until construction of the fence was completed was chargeable to Twin Parks. The

contracts contained no reference to the fence. It was only subsequently, when NSC was informed of the requirement by a city official, that Twin Parks directed NSC to undertake the additional work, which of necessity extended the target date for completion of the project. In any event, NSC hardly could have assumed the risk that the city would refuse a permit due to the absence of the fence. See Acme Moving & Storage v. Bower, 269 Md. 478, 484-85 (1973).

Of significance is the finding of the bankruptcy court that Twin Parks waived the requirement of the four-month completion date. This finding is supported by evidence of conduct manifesting waiver, notably, the continued approval of requisitions for payment of installments to NSC, and the absence of any objection to the delays. Even assuming that

the facts sustained a finding of willful delay by NSC, which they do not, it is nevertheless clear that Twin Parks relinquished any right it might have had to assert a claim against NSC on that account. NSC's conduct, in any event, would amount toan estoppel. Gould v. Transamerican, 224 Md. 285 (1960); Benson v. Borden, 174 Md. 202 (1938). Having concluded that Twin Parks had waived any delay in performance and that such delay, in any event, was excusable, sny discussion of Twin Parks' damage claim is superfluous.

In its counterclaim, Twin Parks also alleges that NSC performed in an unworkmanlike manner, used defective materials, and failed to correct the faulty workmanship. The testimony of Twin Parks' witness, Robert Culver, the management agent, was that he arranged to have outside workmen do some work not performed by NSC at a total expense of $255, and some touch-up

work amounting to an additional $100. Mr. Newman, the project manager, testified, and Culver admitted, that NSC had not been notified of the need for this additional and/or touch-up work. He stated that NSC had not been billed for the work, nor had charge-backs against NSC's requisitions been made.

The other witness called by Twin Parks was Charles Rohm, an employee of an architectural firm hired by the lender to make site observations prior to payment of draws to NSC by the lender. His testimony was that NSC's work was generally of an acceptable quality, and that inspectors from the various municipal agencies had approved the work. Mr. Rohm cited only one instance where an adjustment was made to NSC's requisition due to some masonry and carpentry work that had not reached the required level of comple-

tion. Mr. Rohm stated that he had approved all requisitions and that no amounts were held back because of delays or poor workmanship.

The court found that Twin Parks made no significant complaints and no claims or charge-backs. Final payment on the original contracts was made to NSC on September 29, 1978. It was not until after this time, in December, 1978, that Twin Parks formally notified NSC of specific complaints.

Mr. Freedlander testified that NSC had not completed the job because of its failure to construct storgae sheds. Both Mr. Arnold and Mr. Newman testified that Mr. Freedlander had requested the patios be extended in lieu of building the sheds. The court found that Mr. Freedlander had not objected to the extension of the patios even though he went to the job site regularly and had an op-

portunity to observe the construction. The court concluded that either an express or an implied agreement had arisen between the parties by which the patios were substituted for the storage sheds.

The findings of the bankruptcy court are not clearly erroneous but are based on substantial evidence. Consequently, the denial of that portion of Twin Parks' counterclaim relating to the sixteen units hereby is affirmed.

The bankruptcy court also dismissed that portion of Twin Parks' counterclaim in which it sought damages in connection with the failure to construct the remaining thirty units. The court held that Twin Parks' failure to pay for the extra work constituted a material breach, which justified NSC's termination of its remaining obligations under the contracts.

Failure to pay an insatllment due on a building contract constitutes a

material breach, which excuses the performance of the builder. Shapiro Eng. Co. v. Day Co., 215 Md. 373, 379 (1957). In this instance, the rule applies equally, inasmuch as the extra work to be performed by NSC arose out of an agreement modifying the original undertaking, or, alternatively, out of an agreement constituting a separate undertaking. Consequently, the fact that all installments had been paid to NSC under the terms of the original contractual undertaking did not affect NSC's right to an installment payment in relation to the extra work, and the excuse of its further performance when the monies were not forthcoming from Twin Parks.

Accordingly, the bankruptcy court's ruling dismissing this portion of the counterclaim hereby is affirmed.

In summary, the decision and final order of the bankruptcy court dated May 14, 1981, hereby is affirmed in all

respects. A separate order will be entered confirming this ruling. [1]

/s/Edward S. Northrop
/t/Edward S. Northrop
Senior United States
District Judge

Dated: April 16, 1982

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[1] The "miscellaneous" arguments of appellant Twin Parks have not been properly raised or briefed. Consequently, this Court declines to consider them on appeal. United States v. Williams, 378 F.2d 665 (4th Cir. 1967).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE

TWIN PARKS LIMITED PARTNERSHIP

- - - - - - - - - - - - - - - - - -

N.S.C. CONTRACTORS, INC.

v.

TWIN PARKS LIMITED PARTNERSHIP

(On Appeal from the United States Bankruotcy Court for the District of Maryland Case No. 79-01029-L)

CIVIL NO. N-81-2047

O R D E R

In accordance with the oral ruling delivered in open court this date, following oral argument on the appeal filed by Twin Parks Limited Partnership, IT IS, this 16th day of April, 1982, ORDERED, as follows:

1. That the Order of the Bankruptcy Court dated May 14, 1981, BE, and the same hereby IS, AFFIRMED in all sub-

stantive respects, with the modification of the amount of prejudgment interest and deposition costs, voluntarily agreed to by appellee, N.S.C. Contractors, Inc.

2. That the amount of the judgment award, so modified, shall read: "the sum of $36,711.11, together with interest thereon from October 13, 1978 through May 13, 1981, at the legal rate of six percent per annum, and ten percent per annum thereafter, together with plaintiff's costs in the matter in the amount of $1,020.93." The total judgment award shall be $36,711.11, on the underlying claim, $5,788.28, as prejudgment interest, and $1,020.93, as costs incident to the bankruptcy proceeding, for a total award of $43,512.32. Costs of this appeal shall be assessed against Twin Parks Limited Partnership.

/s/Edward S. Northrop
/t/Edward S. Northrop
Senior United States
District Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF MARYLAND

IN RE:

TWIN PARKS LIMITED PARTNERSHIP

BANKRUPTCY NO. 79-01029-L

BALTIMORE, MARYLAND

May 9, 1981

THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING BEFORE THE HONORABLE HARVEY M. LEBOWITZ AT 10:00 A.M.

A P P E A R A N C E S

ON BEHALF OF MAURICE P. FREEDLANDER:
BENJAMIN LIPSITZ, ESQUIRE

ON BEHALF OF NSC CONTRACOTRS, INC.:
ALAN H. KENT, ESQUIRE

PROCEEDINGS

- - - - -

THE COURT: GOOD MORNING.

THE CLERK: WE HAVE THE CONTINUANCE OF TWIN PARKS LIMITED PARTNERSHIP, DEBTOR 79-01029-L.

THE COURT: GENTLEMEN, I BELIEVE

THE LAST INSTALLMENT OF THIS CONTINUING SAGA HAD MR. NEWMAN ON THE STAND. WAS MR. NEWMAN FINISHED WITH?

MR. LIPSITZ: YES, SIR.

MR. KENT: YES, YOUR HONOR.

THE COURT: MR. NEWMAN WAS CALLED OUT OF TURN, AS I RECALL; IS THAT RIGHT, MR. KENT?

MR. KENT: YES, YOUR HONOR. THAT'S CORRECT. HE WAS --

THE COURT: ARE THERE ANY OTHER WITNESSES?

MR. KENT: NO.

THE COURT: ARE YOU READY FOR CLOSING ARGUMENT?

MR. LIPSITZ: I'D LIKE TO OFFER SOME REJOINDER TESTIMONY, I SUPPOSE IT WOULD BE, YOUR HONOR, IF THE COURT WILL PERMIT IT. I DON'T KNOW WHETHER THAT'S MY RIGHT OR WHETHER IT IS DISCRETIONARY, FRANKLY, BUT --

THE COURT: ALL RIGHT. LET'S

MAKE SURE THAT THE RECORD IS CLEAR. MR. KENT, YOU CLOSED YOUR CASE.

* * * * *

THE COURT: ALL RIGHT. ANYTHING ELSE, MR. KENT?

MR. KENT: I GUESS THAT ABOUT COVERS EVERYTHING, YOUR HONOR.

THE COURT: ALL RIGHT. MR. LIPSITZ, YOU DON'T NEED ANY MORE TIME, DO YOU?

MR. LIPSITZ: I WOULDN'T TAKE IT IF I THOUGHT I NEED IT IT (SIC), YOUR HONOR.

THE COURT: ALL RIGHT. GENTLEMEN, YOU HAVE ALL SET THE PACE OF THIS TRIAL AND I AM GOING TO FOLLOW YOUR PACE. I WILL FOCUS FIRST ON THE CLAIM OF NSC AGAINST TWIN PARKS AND THEN ON THE COUNTERCLAIM OF TWIN PARKS AGAINST NSC.

THE FIRST THING I WILL MAKE FINDINGS ON IS THE VALIDITY AND EFFECT OF THE VARIOUS CONTRACT DOCUMENTS. THE

COURT FINDS THAT AIA CONTRACT DATED MARCH 7, 1977, PLAINTIFF'S EXHIBIT 1, IS VALID AND ENFORCEABLE AS MODIFIED BY AIA CONTRACT DATED FEBRUARY 6, 1978, PLAINTIFF'S EXHIBIT NUMBER 5.

THE COURT FURTHER FINDS THAT AIA CONTRACT DATED FEBRUARY 6TH, 1978, PLAINTIFF'S EXHIBIT 5, IS VALID AND ENFORCEABLE AND MODIFIES THE TERMS OF PLAINTIFF'S EXHIBIT 1 AND IS ITSELF MODIFIED BY THE TERMS AND CONDITIONS OF AN AGREEMENT DATED FEBRUARY 6, 1978, WHICH FOR THE SAKE OF THESE FINDINGS WILL BE DESIGNATED SUPPLEMENTAL AGREEMENT.

THE SUPPLEMENTAL AGREEMENT DATED FEBRUARY 6, 1978, PLAINTIFF'S EXHIBIT NUMBER 6, IS ALSO VALID AND ENFORCEABLE AND MODIFIES THE TERMS AND CONDITIONS OF PLAINTIFF'S EXHIBIT NUMBER 5. ACCORDING TO THE TESTIMONY OF EDWARD ARNOLD, PRESIDENT OF NSC, WHICH THE COURT ACCEPTS, HE PREPARED THE

LONG FORM STIPULATED SUM AIA CONTRACT AND SUBMITTED IT TO MAURICE FREEDLANDER WHO WAS ACTING ON BEHALF OF A PARTNERSHIP TO BE FORMED. FREEDLANDER APPRENTLY DID NOT LIKE THE LONG FORM SO HE PREPARED A SHORT FORM AIA CONTRACT WHICH BECAME THE AGREEMENT OF 3-7-77 WHICH IS PLAINTIFF'S EXHIBIT NUMBER 1.

AT OR ABOUT THE SAME TIME AT THE SUGGESTION OF MR. FREEDLANDER AN ADDITIONAL AGREEMENT WAS PREPARED. THAT WOULD BE PLAINTIFF'S EXHIBIT 6 WHICH EVENTUALLY BECAME THE SUPPLEMENTARY AGREEMENT. THE ORIGINAL DATE ON THAT AGREEMENT WAS MARCH, '77.

THIS AGREEMENT PROVIDED FOR A SHARING OF ANY COST SAVING BETWEEN NSC AND MAURICE FREEDLANDER WHO WAS ACTING FOR THE PARTNERSHIP TO BE FORMED. ARNOLD CONSIDERED THE SUPPLEMENTAL AGREEMENT AS CONVERTING THE STIPULATED SUM CONTRACT TO A COST PLUS CONTRACT.

NOW, THERE WAS A DELAY BECAUSE CONSTRUCTION FUNDS WERE NOT YET AVAILABLE, EITHER BECAUSE THE FINANCING WITH METROPOLIS BUILDING AND LOAN HAD NOT BEEN FINALIZED ACCORDING TO MR. ARNOLD'S TESTIMONY OR BECAUSE METROPOLIS WAS GIVING MR. FREEDLANDER TIME TO FORM HIS PARTNERSHIP. THAT'S MR. FREEDLANDER'S TESTIMONY.

IN ANY EVENT, NEITHER THE AGREEMENT OF 3-7-77 SIGNED BY MR. FREEDLANDER NOR THE SUPPLEMENTAL AGREEMENT HAVING THE TYPED DATED MARCH, '77 BECAME OPERATIVE AT THAT TIME. A COMMITMENT FOR FINANCING THE 46 TOWNHOUSES WAS OBTAINED FROM METROPOLIS SAVINGS AND LOAN AND NOW THE PARTIES WERE READY TO PROCEED. HOWEVER, THERE HAD BEEN A SIGNIFICANT TIME LAPSE FROM MARCH 7, 1977 AND CIRCUMSTANCES HAD CHANGED ESPECIALLY WITH REGARD TO INCREASE IN CONSTRUCTION COSTS.

AS A RESULT, THE CONTRACT OF

3-7-77 AND THE SUPPLEMENTAL AGREEMENT WERE UPDATED AND MODIFIED AND RESULTED IN THE AIA CONTRACT OF FEBRUARY 6, 1978, AND THE SUPPLEMENTAL AGREEMENT OF THE SAME DATE WHICH WERE PLAINTIFF'S EXHIBITS NUMBERS 5 AND 6.

MR. ARNOLD SIGNED AND INITIALED THE MODIFIED AGREEMENTS AND SENT THEM TO MR. FREEDLANDER. THE SIGNATURE PAGES OF THE AIA CONTRACT, THAT'S PLAINTIFF'S NUMBER 5, APPARENTLY WAS A XEROX COPY OF AN EARLIER AGREEMENT AND THEREFORE ONLY CONTAINED A COPY OF MR. FREEDLANDER'S SIGNATURE. FREEDLANDER DID NOT RESIGN THE FEBRUARY 6, 1978, AIA AGREEMENT NOR DID HE INITIAL ANY OF THE CHANGES WHICH ARNOLD HAD ON EITHER THE AIA CONTRACT OR THE SUPPLEMENTAL AGREEMENT. HOWEVER, FROM THE PERIOD OF FEBRUARY 6, 1978, UNTIL OCTOBER OF 1978, AND EVEN THEREAFTER, THE COURT FINDS THAT THE PARTIES PERFORMED AND OPERATED UNDER THE TERMS OF

THESE AGREEMENTS.

THE COURT FURTHER FINDS THAT THE AGREEMENTS TAKEN AS A WHOLE AND CONSIDERED AND CONSTRUED TOGETHER CONSTITUTE A VALID OPERATIVE AND BINDING AGREEMENT BETWEEN THE PARTIES.

THE COURT FURTHER FINDS THAT AT NO TIME DURING THE ACTUAL CONSTRUCTION OF THE PROJECT DID MR. FREEDLANDER EVER REPUDIATE ANY OF THESE AGREEMENTS AND HE EITHER EXPRESSLY OR IMPLIEDLY BY HIS ACTS AND CONDUCT AGREED TO THE TERMS OF THE VARIOUS AGREEMENTS.

THE COURT FURTHER FINDS NO SIGNIFICANCE, R. LIPSITZ, IN THE FACT THAT SOME OF THE DOCUMENTS MAY BE IN THE NAME OF TWIN PARKS AND OTHERS IN THE NAME OF MR. FREEDLANDER. MR. FREEDLANDER WAS AT ALL TIMES ACTING ON BEHALF OF A PARTNERSHIP TO BE FORMED AND AS AS AGENT OF THAT PARTNERSHIP AND/OR ITS CORPORATE GENERAL PARTNER. ALL OF MR. FREEDLANDER'S ACTS WERE DONE IN A FIDUCIARY CAPACITY AND

FOR THE BENEFIT OF THE PARTNERSHIP.

IN POINT OF FACT, THERE IS A CLEAR ACKNOWLEDGMENT IN THE AGREEMENTS THEMSELVES THAT THE PARTNERSHIP HAS NOT YET BEEN FORMED AND THEREFORE THE ACTS OF MR. FREEDLANDER, WHETHER THEY BE IN THE NAME OF THE PARTNERSHIP TO BE ORGANIZED OR IN HIS OWN NAME, WERE ACTS OF THE PARTNERSHIP WHEN IT DID IN FACT COME INTO EXISTENCE.

NOW, THE FIRST ITEM WILL BE THE FENCE. NEITHER PLAINTIFF'S EXHIBIT 1, EXHIBIT 5, OR EXHIBIT 6 CONTAIN ANY SPECIFIC REFERENCE TO THE FENCE AS BEING INCLUDED WITHIN THE WORK COVERED BY THE CONTRACT OR WITHIN THE CONTRACT PRICE. IT IS NEITHER ENCOMPASSED BY THE WORK DESCRIBED IN ARTICLE ONE NOR IS IT SHOWN ON ANY OF THE DRAWINGS INCORPORATED IN THE CONTRACT UNDER ARTICLE 6 OF EITHER EXHIBIT 1 OR EXHIBIT 5. ALTHOUGH THE FENCE MAY HAVE BEEN SHOWN ON A SITE PLAN

OF THE PROPERTY, WHICH MR. ARNOLD MAY HAVE SEEN AND WHICH MR. FREEDLANDER MAY HAVE INTENDED TO HAVE BEEN INCLUDED AMONG THE ENUMERATED CONTRACT DOCUMENTS DESCRIBED IN ARTICLE 6 OF THE AIA CONTRACT, THE SITE PLAN WAS NOT IN FACT INCLUDED AND THEREFORE WAS NOT A PART OF THE WORK TO BE DONE UNDER THAT CONTRACT.

MR. FREEDLANDER HAD AMPLE OPPORTUNITY TO REVIEW THE TERMS AND CONDITIONS OF THE VARIOUS AIA CONTRACTS. IT APPEARS FROM THE TESTIMONY THAT THE ORIGINAL DRAFT OF THE AIA CONTRACT WAS SENT TO MR. FREEDLANDER BY MR. ARNOLD. APPARENTLY MR. FREEDLANDER DID NOT PARTICULARLY LIKE THE LONG FORM AND THEREFORE REDRAFTER IT AND RETURNED IT TO MR. ARNOLD. THAT WAS IN MARCH OF 1977. AGAIN, IN FEBRUARY 1978 THE MODIFIED AIA CONTRACT, PLAINTIFF'S EXHIBIT 5, WAS SUBMITTED TO MR. FREEDLANDER. AND AGAIN THERE WAS NO INCORPORATION IN THAT CON-

TRACT OF THE SITE PLAN. MR. FREEDLANDER IN FACT ADMITTED THAT HE BECAME AWARE THAT THE ENGINEERING DRAWINGS WERE NOT INCLUDED IN THE CONTRACT OF MARCH 7TH, 1977, SHORTLY AFTER IT WAS SUBMITTED BUT HE DID NOTHING.

THE COURT FINDS THAT MR. FREEDLANDER MADE NO OBJECTION TO EITHER THE FIRST OR SECOND AIA CONTRACT, NOR DID HE AT ANY TIME PRIOR TO THE WORK BEING DONE BY NSC INSIST THAT THE SITE PLAN BE INCLUDED WITHIN THE SCOPE OF THE WORK.

AS FURTHER EVIDENCE THAT THE FENCE WAS NOT INCLUDED NOR INTENDED TO BE INCLUDED IN THE SCOPE OF THE WORK UNDER THE CONTRACT IS THE FACT THAT IT WAS NOT UNTIL THE CITY OF SALISBURY AS A CONDITION PRECEDENT TO THE CONTINUATION OR THE COMPLETION OF A JOB DEMANDED THE FENCE BE CONSTRUCTED.

IT WAS AT THAT TIME AND FOR THE FIRST TIME THAT ANY SPECIFIC REQUEST WAS

MADE TO NSC THAT IT CONSTRUCT THE FENCE. ACCORDING TO THE TESTIMONY OF PATRICK NEWMAN, NSC'S PROJECT MANAGER OF THE TWIN PARKS PROJECT, THE FIRST CONVERSATION WITH REGARD TO THE FENCE OCCURRED IN FEBRUARY OF 1978 WHEN MR. NEWMAN MET WITH THE BUILDING INSPECTOR. ACCORDING TO MR. NEWMAN, HE HAD NOT SEEN A SITE PLAN UNTIL THAT TIME. IT WAS AT THAT TIME THAT THE BUILDING INSPECTOR ADVISED MR. NEWMAN OF THE REQUIREMENT FOR THE FENCE. MR. NEWMAN AND MR. FREEDLANDER THEN ATTEMPTED TO HAVE THE FENCE ELIMINATED BY THE TOWN COUNCIL OF THE CITY OF SALISBURY WITHOUT SUCCESS. MR. NEWMAN FURTHER TESTIFIED, AND THE COURT SO FINDS, THAT HE ADVISED FREEDLANDER THAT NSC WAS NOT GOING TO PAY FOR THE FENCE, TO WHICH MR. FREEDLANDER RESPONDED THAT IF IT HAD TO BE PUT IN, NSC SHOULD DO IT AND HE WOULD TRY TO FIND A WAY TO HAVE THE FENCE PAID FOR.

IN ADDITION, ALTHOUGH NO WRITTEN CHANGE ORDER HAD YET BEEN SUBMITTED TO TWIN PARKS, AS EARLY AS APRIL THIRD, 1978, ON PROGRESS REPORT NUMBER ONE, THAT'S PLAINTIFF'S EXHIBIT NUMBER 10, THE FENCE IS SHOWN AS AN ANTICIPATED EXTRA AT AN APPROXIMATE COST OF $10,000.

MR. FREEDLANDER MADE NO OBJECTION TO THIS ANTICIPATED EXTRA. IT WAS SHOWN AGAIN ON PROGRESS REPORT NUMBER 2 AND AGAIN ON PROGRESS REPORT NUMBER 3 DATED MAY 17TH AND JULY 18TH, RESPECTIVELY. THEY ARE PLAINTIFF'S EXHIBITS NUMBERS 11 AND 12. AND AGAIN NO OBJECTION WAS MADE BY MR. FREEDLANDER.

ON CROSS-EXAMINATION MR. FREEDLANDER ADMITTED THAT HE INSTRUCTED NSC TO BUILD THE FENCE BUT HE SAYS HE NEVER AGREED TO PAY FOR THE FENCE. HE TESTIFIED THAT HE SAID NOTHING. HE ALSO APPARENTLY DID NOT SAY THAT TWIN PARKS WOULD NOT PAY FOR THE FENCE. IN FACT, WHEN RE-

MINDED OF HIS DEPOSITION TESTIMONY MR. FREEDLANDER STATED THAT HE TOLD MR. NEWMAN THAT IF METROPOLIS WOULD AGREE TO PAY FOR THE CHANGE ORDERS, THAT WOULD BE THE FENCE, THE FILL AND THE BOND, TWIN PARKS WOULD THEN PAY NSC. HE IN FACT DID TAKE THE CHANGE ORDERS TO METROPOLIS BUT METROPOLIS REFUSED TO PAY.

FROM ALL OF THE EVIDENCE, THE COURT IS CONVINCED THAT NSC IS ENTITLED TO BE PAID THE COST OF THE FENCE IN THE AMOUNT OF $12,368.00 INCLUDING THE 10 PERCENT BUILDER'S FEE.

THE FILL DIRT. NEITHER PLAINTIFF'S EXHIBIT NUMBER 1, NUMBER 5 OR NUMBER 6 INCLUDE THE FILL DIRT WITHIN THE SCOPE OF THE WORK TO BE DONE OR WITHIN THE CONTRACT PRICE. TO THE CONTRARY, THE COURT FINDS THAT THE CONTRACT SPECIFICALLY EXCLUDES THAT WORK FROM THE CONTRACT PRICE. ARTICLE 1 OF PLAINTIFF'S EXHIBIT 1 AND EXHIBIT 5

SPECIFICALLY STATES, "THE WORK DOES NOT INCLUDE (1) SITE DEVELOPMENT." FILL IS A PART OF SITE DEVELOPMENT.

PARAGRAPH ONE OF ARTICLE TWO ALSO STATES THAT THE SITE IS TO BE GRADED TO MINUS 2-10THS OF ONE FOOT TO PLUS OR MINUS 2-10THS OF ONE FOOT BY OTHERS. THERE IS NO DOUBT IN THE COURT'S MIND THAT IF THE GRADE WAS NOT PLUS OR MINUS TWO-TENTHS OF ONE FOOT, OTHERS AND NOT NSC WOULD BE REQUIRED TO DO THE SITE DEVELOPMENT IN ORDER TO BRING THE PROPERTY TO PROPER GRADE. MR. ARNOLD TESTIFIED THAT MR. FREEDLANDER HAD TOLD HIM THAT THE GRADING HAD BEEN DONE BY OTHER CONTRACTORS AND THAT NSC COULD BEGIN WITH EXCAVATION AND THIS IS BORNE OUT BY THE EXPRESS TERMS OF THE CONTRACT WHICH DOES IN FACT REQUIRE THAT THAT WORK BE DONE BY OTHERS.

ACCORDING TO THE TESTIMONY OF MR. NEWMAN, IT WAS NOT UNTIL NSC SET UP

BATTER BOARDS, I'M NOT QUITE SURE HOW THE WORD BATTER IS SPELLED -- IS IT B A T T E R?

THE COURT: BATTER BOARDS WHICH ARE APPARENTLY BOARDS USED TO TEST THE LEVEL OF THE GROUND THAT IT WAS FIRST DISCOVERED THAT FILL DIRT WAS NEEDED. BECAUSE THERE WAS NOT ENOUGH FILL DIRT ON THE SITE, IT WAS REQUIRED TO BE BROUGHT IN.

ACCORDING TO MR. NEWMAN, MR. FREEDLANDER WAS SURPRISED BUT TOLD MR. NEWMAN TO GET THE FILL DIRT.

ACCORDING TO MR. NEWMAN, THEY COULD NOT USE A MOUND OF EARTH THAT WAS ON THE PROPERTY SINCE THIS WAS TOP SOIL AND NOT FILL DIRT AND THEREFORE THEY HAD TO BRING FILL DIRT INTO THE PROPERTY. AGAIN, MR. FREEDLANDER KNEW THAT THIS ITEM WAS BEING CONSIDERED AS AN EXTRA AS EARLY AS APRIL THE THIRD, 1978, WHEN HE RECEIVED PROGRESS REPORT NUMBER ONE SHOWING THE FILL DIRT AS AN ANTICIPATED

EXTRA IN THE APPROXIMATE AMOUNT OF $5,000. IT WAS AGAIN SHOWN ON PROGRESS REPORT NUMBER TWO AND THREE. NO OBJECTION WAS MADE BY MR. FREEDLANDER AND AGAIN MR. FREEDLANDER DID NOTHING.

THIS WAS ALSO ONE OF THE ITEMS FOR WHICH MR. FREEDLANDER ATTEMPTED TO OBTAIN FUNDS FROM METROPOLIS WITHOUT SUCCESS.

BASED ON ALL THE FACTS, THE COURT IS AGAIN CONVINCED THAT THE FILL DIRT IS NOT COVERED BY THE CONTRACT AND NOT WITHIN THE CONTRACT SUM AND NSC IS ENTITLED TO PAYMENT FOR THE FILL DIRT AND GRADING IN THE AMOUNT OF $13,738.50 INCLUDING A BUILDER'S FEE OF 10 PERCENT.

THE COMPLETION BOND. EITHER EXHIBITS 1, 5 OR 6, PLAINTIFF'S EXHIBITS 1, 5 OR 6 INCLUDE COSTS FOR COMPLETION BOND PREMIUM AS A PART OF THE CONTRACT PRICE. TO THE CONTRARY, THE COURT SPECIFICALLY FINDS THAT THE CONTRACT SPECIFICALLY EXCLUDES THE COST OF THE

COMPLETION BOND AS BEING COVERED BY THE CONTRACT PRICE. ARTICLE 3 OF EXHIBIT 1 AND EXHIBIT 5 SPECIFICALLY SAYS, "THE CONTRACT DOES NOT INCLUDE THE COST OF PERFORMANCE AND LABOR AND MATERIAL PAYMENT BOND."

ARTICLE 3 OF EXHIBIT 1 AND EXHIBIT 5 ALSO PROVIDES THAT ITEMS SUCH AS THE COST OF PERFORMANCE AND LABOR AND MATERIAL PAYMENT BOND ARE INCLUDED IN THE SCHEDULE OF SOFT COSTS SUBMITTED BY THE OWNER TO THE LENDER. MR. FREEDLANDER WAS TO RECEIVE SOFT COST AMOUNTS WHICH WERE TO BE PAID DIRECTLY BY HIM FOR THE ITEMS COVERED UNDER SOFT COSTS. SOFT COSTS ITEMS BEING ITEMS OF NONBRICK AND MORTAR, AND WERE NOT INCLUDED WITHIN THE SCOPE OF THE WORK OR WITHIN THE CONTRACT PRICE.

ARTICLE 3 FURTHER REQUIRES A PERFORMANCE BOND TO BE POSTED BY NSC.

THE COURT CONCLUDES THAT ALTHOUGH

NSC WAS IN FACT REQUIRED TO POST A BOND, THE COST OF THE PREMIUM FOR THAT BOND WAS COVERED UNDER THE DEFINITION OF SOFT COSTS AND NOT COVERED BY THE CONTRACT PRICE AND NOT REQUIRED TO BE PAID BY NSC.

AT THE REQUEST OF THE COURT, ON FEBRUARY 5, 1981, MR. FREEDLANDER WAS TO EXAMINE HIS RECORDS TO SEE IF HE COULD FIND A BREAKDOWN TO THE LENDER OF THE SOFT COST ITEMS. ON APRIL 24, 1981, MR. FREEDLANDER IN RESPONSE TO A QUESTION BY THE COURT STATED HE HAD FOUND THE BREAK-DOWN AND ALTHOUGH THE BOND WAS NOT INCLUDED IN THE LIST OF SOFT COSTS, THERE WAS A SLUCH FUND WHICH WAS TO COVER A NUMBER OF NISCELLANEOUS COSTS AND IT COULD HAVE BEEN INCLUDED IN THAT FUND. HE FURTHER TESTI-FIED THAT TWIN PARKS DID IN FACT PAY THE COST OF THE BUILDING PERMIT AND THE COST OF THE BUILDER'S RISK INSURANCE WHICH ARE THE OTHER TWO ITEMS LISTED UNDER ARTICLE 3 OF EXHIBITS 1 AND 5 WHICH ARE INCLUDED

WITHIN THE SOFT COST ITEMS.

AGAIN, MR. FREEDLANDER KNEW OF THE EXTRA FOR THE PAYMENT OF THE BOND PREMIUM AS EARLY AS MAY 17TH, 1978, WHEN HE RECEIVED PROGRESS REPORT NUMBER 2. AND IT WAS SHOWN AGAIN AS AN EXTRA ON PROGRESS REPORT NUMBER 3. AND AGAIN MR. FREEDLANDER TOOK NO ACTION. THIS IS ALSO AN ITEM FOR WHICH MR. FREEDLANDER ATTEMPTED TO OBTAIN ADDITIONAL FUNDS FROM METROPOLIS WITHOUT SUCCESS.

BASED ON THE COURT'S FINDINGS, IT IS AGAIN CONVICED FROM ALL THE EVIDENCE THAT THE COST OF THE CONTRACT, OR COMPLETION BOND, IS NOT COVERED BY THE CONTRACT AND NOT WITHIN THE CONTRACT SUM AND NSC IS ENTITLED TO PAYMENT FOR THE COST OF THE COMPLETION BOND IN THE AMOUNT OF $4,604.60 INCLUDING THE BUILDER'S FEE OF 10 PERCENT.

THE COURT FURTHER FINDS THAT ALTHOUGH THE PARTIES WERE AWARE OF THE FACT THAT CHANGE ORDERS WERE TO BE IN

WRITING, AND THE WRITTEN CHANGE ORDERS FOR THE FENCE, THE FILL AND THE BOND WERE NOT SENT BY NSC TO TWIN PARKS UNTIL AFTER OCTOBER OF 1978, THE COURT FINDS THAT THE PARTIES HAD DURING THE CONTINUATION OF THE PROJECT DEVELOPED A POLICY OF MAKING ORAL CHANGE ORDERS. NOT ONLY WERE THE CHANGE ORDERS FOR THE FENCE, THE FILL AND THE BOND MADE ORALLY, BUT OTHER CHANGE ORDERS WERE ALSO MADE ORALLY. THE PARTIES ORALLY AGREED THAT MR. FREEDLANDER WOULD OBTAIN THE APPLIANCES, THE CARPETING, WOULD DO THE LANDSCAPING, AND WOULD BE GIVEN CREDIT FOR THESE ITEMS AGAINST THE CONTRACT PRICE.

THERE WAS ALSO AN UNDERSTANDING THAT NSC WOULD PERFORM WORK ON THE EXISTING UNITS WHICH NEEDED REPAIR. NONE OF THESE WERE REDUCED TO WRITING OR THE SUBJECT OF A CHANGE ORDER.

THE COURT FINDS THAT THE FAILURE OF NSC TO SUBMIT WRITTEN CHANGE ORDERS

BEFORE THE WORK WAS DONE DOES NOT DEFEAT THEIR RIGHT TO RECOVER THE COST OF THESE EXTRAS.

WHAT DOES BECOME APPARENT WHEN REVIEWING ALL OF THE EVIDENCE IN THIS CASE IS THE FACT THAT MR. FREEDLANDER'S TESTIMONY IS AT TIMES INCONSISTENT WITH PRIOR DEPOSITION TESTIMONY AND THE EXHIBITS SUBMITTED IN THIS CASE AND HIS ABILITY TO RECALL SPECIFIC MATERAIL EVENTS IS SOMETIMES DEFICIENT. WHAT HAS ALSO BECOME APPARENT, IF MR. FREEDLANDER'S TESTIMONY IS TO BE TAKEN AT FACE VALUE, IS THAT ALTHOUGH HE MAY HAVE DISAGREED WITH A NUMBER OF THINGS AND MAY HAVE HAD MANY COMPLAINTS, HE DID NOTHING AT ALL. HIS TESTIMONY AMOUNTS TO A STATEMENT THAT HE JUST NEVER AGREED. BUT HE DID NOT DISAGREE, HE DID NOT OBJECT IN A TIMELY FASHION, HE DID NOT DISAPPROVE IN A TIMELY FASHION, HE DID NOT COMPLAIN IN A

TIMELY FASHION, HE MERELY DID NOTHING AND IT IS ONLY AFTER THE WORK WAS DONE AND THE COST INCURRED BY NSC BECAUSE IN FACT THE COST HAD TO BE INCURRED FOR THE PROJECT TO PROCEED THAT HE FIRST OBJECTS.

HE DENIES THE RESPONSIBILITY ONLY AFTER HAVING RECEIVED THE BEENFITS. TO THE EXTENT THAT HE STOOD BY AND LET NSC PERFORM THE WORK OR INCUR THE COSTS WITHOUT TAKING A CLEAR-CUT POSITION WITH RESPECT TO WHOSE LIABILITY THAT ITEM WAS HE MISLED NSC INTO BELIEVING THAT IT WOULD BE COMPENSATED IF IT IN FACT DID THE WORK.

THE LOANS. BOTH MR. ARNOLD AND MR. NEWMAN TESTIFIED THAT MR. FREEDLANDER REQUESTED ADVANCES OR LOANS FROM NSC. THESE LOANS WERE MADE FROM DRAWS RECEIVED BY NSC. THREE SEPARATE LOANS TOTALING $6,000 WERE MADE BY NSC, ONE FOR $1,000, BY CHECK PAYABLE TO MR.

FREEDLANDER, PLAINTIFF'S EXHIBIT NUMBER 21, ANOTHER BY CHECK FOR $4,000 PAYABLE TO MR. FREEDLANDER, PLAINTIFF'S EXHIBIT NUMBER 22, AND THE THIRD BY CHECK PAYABLE TO TWIN PARKS LIMITED PARTNERSHIP FOR $1,000, PLAINTIFF'S EXHIBIT NUMBER 23.

MR. ARNOLD TESTIFIED THAT THE TWO CHECKS PAYABLE TO MR. FREEDLANDER WERE MADE PAYABLE TO HIM BY MISTAKE AND SHOULD HAVE BEEN TO TWIN PARKS AND THAT THEY WERE IN FACT CHARGED TO TWIN PARKS ON THE COMPANY'S BOOKS.

IT IS CLEAR FROM THE CHECK STUBS OR THE ENDORSEMENTS ON THE BACK OF THE CHECKS THAT THESE CHECKS WERE FOR THE BENEFIT OF TWIN PARKS AND NOT MR. FREEDLANDER INDIVIDUALLY.

THE COURT FINDS FROM THE FACTS THAT ALL THESE CHECKS WERE LOANS TO OR FOR THE BENEFIT OF TWIN PARKS, THAT DEMAND FOR PAYMENT HAS BEEN MADE, THAT NO PAYMENT

HAS BEEN RECEIVED AND THEREFORE FINDS TWIN PARKS OBLIGATED TO REPAY NSC THE SUM OF $6,000.

ESCALATION. ACCORDING TO THE TESTIMONY, NO WORK WAS BEGUN UNDER THE CONTRACT OF 1977 BECAUSE FINANCING WAS NOT YET AVAILABLE. AS A RESUTL, THERE WAS A SUBSTANTIAL DELAY WHICH RESULTED IN THE UPDATING OF THE 1977 CONTRACT BY THE CONTRACT OF 1978, THIS WAS ACCOMPLISHED BY USING THE EARLIER CONTRACT AND INSERTING CHANGES TO ACCOMMODATE THE CHANGE IN CIRCUMSTANCES BETWEEN MARCH, '77 AND FEBRUARY OF '78. DURING THAT PERIOD OF TIME, CONSTRUCTION COSTS HAD INCREASED SUBSTANTIALLY AND IT WAS ESTIMATED THAT IT WOULD COST AN ADDITIONAL $700 PER UNIT TO COMPLETE. THIS CHANGE WAS INCORPORATED IN AIA CONTRACT OF 1978, EXHIBIT NUMBER 5. MR. FREEDLANDER ACKNOWLEDGED RECEIVING THE 1978 CONTRACT WITH THIS PROVISION CONTAINED IN IT. ALTHOUGH

HE DID NOT INITIAL THIS CHANGE, HE MADE NO OBJECTION NOR DID HE MAKE ANY EFFORT TO CORRECT THAT ERROR IF IN FACT IT WAS AN ERROR. THE WORK WAS BEGUN IN FEBRUARY 1978, CONTINUED THROUGH AT LEAST OCTOBER OF 1978. DURING THIS ENTIRE TIME MR. FREEDLANDER DID NOTHING TO REFUTE THIS PROVISION.

THE COURT IS CONVINCED THAT THE PARTIES IN FACT DID AGREE TO AN INCREASE OF $700 PER UNIT. THE PARTIES ALSO EXECUTED PLAINTIFF'S EXHIBIT 6, THE SUPPLEMENTAL AGREEMENT, WHICH WAS DATED THE SAME DAY AS EXHIBIT NUMBER 5. THE ORIGINAL DATE OF THIS AGREEMENT WAS TO BE MARCH OF '77. THIS DATE WAS STRICKEN THROUGH AND THE 6TH DAY OF FEBRUARY, 1978, WAS INSERTED. AND IT WAS MODIFIED TO CONFORM WITH THE AIA CONTRACT OF THE SAME DATE. THE PARTIES -- THE AGREEMENT FURTHER CORROBORATES THE FACT THAT THE PARTIES AGREED TO AN ADDITIONAL ALLOWANCE OF $700

PER UNIT AS REQUIRED. MR. ARNOLD TESTIFIED THAT THE SUPPLEMENTAL AGREEMENT WAS INTENDED TO CONVERT THE AIA STIPULATED SUM CONTRACT TO A COST PLUS CONTRACT. UNDER THE TERMS OF THE SUPPLEMENTAL AGREEMENT, ALTHOUGH THE UNITS WERE TO COST NO MORE THAN 21,802 THE CALCULATION BEING $12,802 PER UNIT TIMES 16 UNITS, THAT'S $21,802 TIMES 16 -- PER UNIT TIMES 16 UNITS WOULD AMOUNT TO 348,832 WHICH IS THE CONTRACT SUM.

IF THERE WERE TO BE ANY SAVING IN COST OF CONSTRUCTION, THE SAVING UNDER THE 21,802 PER UNIT WOULD BE SHARED BETWEEN THE PARTIES IN THE RATIO SET OUT IN SUPPLEMENTAL AGREEMENT. HOWEVER, BECAUSE OF THE DELAY IN CONSTRUCTION, THERE WAS AN INCREASE IN CONSTRUCTION COSTS AND AN ADDITIONAL PROVISION SIMILAR TO THAT CONTAINED IN EXHIBIT NUMBER 5 WAS ADDED TO THE SUPPLEMENTAL AGREEMENT TO COVER THE COST ESCALATION FROM MARCH 1977 OT JAN-

UARY FIRST, 1978, AND PROVIDED FOR AN ALLOWANCE OF AN ADDITIONAL $7,000 PER UNIT TO BE MADE AVAILABLE AS REQUIRED. THIS CHANGE WAS INITIALED BY MR. ARNOLD, SUBMITTED TO MR. FREEDLANDER BUT NOT INITIALED BY MR. FREEDLANDER.

THE COURT FINDS THAT ALTHOUGH THE FEBRUARY 19 -- THE COURT FINDS THAT ALTHOUGH BY FEBRUARY 1978 THERE WOULD HAVE BEEN LITTLE OR NO LIKELIHOOD OF A COST SAVING BELOW 21,802 PER UNIT, THERE IS NO INCONSISTENCY OR VIOLATION OF THAT PROVISION BY THE INSERTION OF THE CLAUSE ALLOWING AN ADDITIONAL $700 PER UNIT AS REQUIRED, BECAUSE IF IN FACT AFTER ALL THE UNITS WERE COMPLETED AND THERE HAD BEEN AN OVERALL COST SAVING, ALTHOUGH NONE WAS CONTEMPLATED AS OF FEBUARY 1978 78, THIS SAVING, IF ANY, WOULD BE SHARED BETWEEN THE PARTIES. THE FACT THAT THE UNITS COULD COST MORE THAN $21,802 AS OF FEBRUARY, 1978, DID NOT

MADE THE AGREEMENTS NULL AND VOID. NOR DID THE AGREEMENTS BECOME NULL AND VOID BECAUSE OF THE FACT THAT IT NOW MIGHT COST MORE THAN $21,802 PER UNIT SINCE THIS CONTINGENCY WAS EXPRESSLY ACKNOWLEDGED BY VIRTUE OF THE INSERTION OF THE ESCALATION PROVISION AND THE ESCALATION AMOUNT.

THE ESCALATION PRICE OF $700 WAS ALSO MEMORIALIZED IN A LETTER TO MR. FREEDLANDER OF NOVEMBER 18, 1977, PLAINTIFF'S EXHIBIT NUMBER 3, WHICH INDICATED THAT IT WOULD BE INCORPORATED IN THE AGREEMENT SO THAT THE PER UNIT PRICE WOULD BE $22,500 AND THE SHARING CLAUSE WAS TO REMAIN.

MR. FREEDLANDER DURING THE ENTIRE TIME OF CONSTRUCTION NEVER OBJECTED TO NOR TOOK EXCEPTION TO THESE PROVISIONS, NOR DID HE MAKE ANY EFFORT TO CORRECT ANY ERRORS, IF IN FACT ANY EXISTED.

THE COURT, HOWEVER, IS DISIN-

CLINED TO AWARD ANY DAMAGES BECAUSE OF THIS ESCALATION PROVISION. MR. ARNOLD TESTIFIED THAT BECAUSE OF THAT SUPPLEMENTAL AGREEMENT, THE AIA CONTRACT BECAME A COST PLUS CONTRACT. THE PROVISION CALLS FOR AN ALLOWANCE OF AN ADDITIONAL $700 PER UNIT TO BE MADE AVAILABLE AS REQUIRED. THERE IS A TOTAL LACK OF EVIDENCE THAT ANY INDICATION WAS GIVEN TO TWIN PARKS DURING CONSTRUCTION THAT ANY ADDITIONAL FUNDS MIGHT BE NEEDED. IN FACT, THERE IS NO EVIDENCE TO INDICATE THAT ANY ADDITIONAL FUNDS WERE EVER REQUIRED TO CONSTRUCT THE PROJECT. ALL REQUISITIONS WERE FOR THE AIA CONTRACT AMOUNTS.

IT APPEARS FROM THE RECORD THAT THE FIRST DEMAND FOR PAYMENT OF ANY ESCALATION SUM WAS NOT MADE UNTIL MARCH THE FIFTH, 1979, IN A LETTER TO MR. FREEDLANDER, THAT'S PLAINTIFF'S EXHIBIT NUMBER 27, REQUESTING PAYMENT OF THE FULL AMOUNT

OF 700 PER UNIT OR $11,200. THAT'S $700 PER UNIT TIMES 16 UNITS. THERE IS NO EVIDENCE THAT THE ADDITIONAL COST PER UNIT IN FACT AMOUNTED TO $700 OR THAT ANY PORTION OF THAT AMOUNT WAS IN FACT REQUIRED.

IF THE CONTRACT IS A COST PLUS CONTRACT THE COST SHOULD HAVE BEEN ITEMIZED TO DETERMINE WHAT PORTION OF THE 700 WAS REQUIRED AND FOR WHAT PURPOSE. THERE BEING NO ITEMIZATION OF THE COSTS AND NO SHOWING BY ANY EVIDENCE THAT FUNDS IN ADDITION TO THE AIA CONTRACT SUM WAS REQUIRED, NSC HAS FAILED TO PROVE THE AMOUNT OF THE ESCALATION, IF ANY, THAT WAS REQUIRED AND THEREFORE THERE CAN BE NO AWARD FOR DAMAGES FOR ESCALATION.

THE COURT THEREFORE FINDS THAT NSC IS NOT ENTITLED TO ANY ESCALATION SUM.

NSC ALSO REQUESTS DAMAGES FOR BREACH OF CONTRACT FOR ANTICIPATED PROFITS ON THE REMAINING 30 UNITS. THERE HAS BEEN

TOTALLY INSUFFICIENT EVIDENCE PRODUCED TO AWARD ANY ANTICIPATED DAMAGES. IT WOULD BE PURE CONJECTURE FOR THE COURT TO AWARD ANY DAMAGES FOR LOSS OF ANTICIPATED PROFITS BASED ON THE EVIDENCE BEFORE IT. IT IS IN FACT CONCEIVABLE THAT HAD THE CONTRACT CONTINUED AT THE FIXED PRICE PLUS NO MORE THAN $700 PER UNIT, NSC MAY WELL HAVE LOST MONEY BECAUSE OF THE VERY SUBSTANTIAL INCREASE IN COSTS WHICH WOULD HAVE INCURRED OVER THE LENGTH OF THE CONTRACT.

FURTHER, EVEN HAD THERE BEEN NO BREACH BY TWIN PARKS, IT IS PROBLEMATICAL WHETHER METROPOLIS WOULD HAVE CONTINUED TO FINANCE THE REST OF THE PROJECT OR THAT TWIN PARKS WOULD HAVE BEEN ABLE TO PROVIDE THE ADDITIONAL CASH NECESSARY TO COMPLETE THE AMENITIES WHICH WERE BEING REQUIRED FOR THE OTHER 30 UNITS.

IN ADDITION, THERE HAS BEEN AN INSUFFICIENT SHOWING OF ANY ACTUAL DIRECT

DAMAGES FROM LOSSES OCCASIONED BECAUSE OF THE CONSTRUCTION OF THE 16 UNITS EXCEPT FOR THOSE ITEMS OF EXTRAS AND THE LOAN. THE COURT THEREFORE CAN FIND NO DIRECT PRESENT DAMAGE OR LOSS BECAUSE OF THE CONSTRUCTION OF THE 16 UNITS NOR CAN IT FIND ANY ANTICIPATED LOSS FOR THE FAILURE TO CONSTRUCT THE OTHER 30 UNITS. THEREFORE, THERE WILL BE NO AWARD TO NSC FOR EITHER DIRECT OR CONSEQUENTIAL DAMAGES.

THAT DISPOSES I BELIEVE OF THE ENTIRE CLAIM OF NSC. I'D LIKE TO TAKE A FIVE-MINUTE RECESS --

MR. KENT: YOUR HONOR, DID YOUR HONOR WISH TO MAKE A RULING ON INTEREST?

THE COURT: I HAVEN'T RULED ON THE CROSS CLAIM YET, MR. KENT. YOU ARE A LITTLE PREMATURE. THAT IS THE RULING. I SAID I WOULD FIRST FOCUS ON THE CLAIM OF NSC AND THEN ON THE CROSS CLAIM. ALL RIGHT?

I'LL DO THAT AFTER A FIVE-MINUTE RECESS ON THE CROSS CLAIM.

(RECESS -- 12:45 P.M.)

(AFTER RECESS -- 12:50 P.M.)

THE COURT: ALL RIGHT, GENTLEMEN. I WILL NOW RULE ON THE COUNTERCLAIM.

TWIN PARKS CLAIMS IN ESSENCE THAT NSC BREACHED ITS CONTRACT BY FAILING TO COMPLETE THE 16 UNITS, FAILING TO COMPLETE THE CONTRACT FOR THE OTHER 30 UNITS, FAILING TO PERFORM ITS WORK IN A GOOD AND WORKMANLIKE MANNER, AND FAILING TO COMPLY WITH THE TIME REQUIREMENTS OF THE CONTRACTS. BASED ON THE FOLLOWING FINDINGS MADE BY THE COURT, THE COURT CAN FIND NO BREACH OR VIOLATION ON THE PART OF NSC.

WITH RESPECT TO DELAY. IT IS TRUE THAT THE CONTRACT PERIOD SUBSTANTIALLY EXCEEDED THE TIME PROVIDED FOR IN THE CONTRACT, HOWEVER THE COURT FINDS THAT THE DELAYS WERE NOT CAUSED THROUGH THE FAULT OF NSC. THE JOB WAS TO BE DONE IN FOUR MONTHS. WORK BEGAN IN FEBUARY OF 1978 AND SHOULD HAVE BEEN COMPLETED ON OR

ABOUT MAY OR JUNE. OCCUPANCY PERMITS, HOWEVER, WERE NOT ISSUED UNTIL OCTOBER OF 1978, PERHAPS SOME FIVE OR SIX MONTHS AFTER THE DATE SET FOR COMPLETION.

HOWEVER, THE COURT FINDS THAT THE DELAYS WERE EXCUSEABLE. ACCORDING TO THE TESTIMONY OF MR. NEWMAN, AND SUPPORTED BY THE PROGRESS REPORTS, PLAINTIFF"S EXHIBITS NUMBERS 10, 11 AND 12, TO WHICH MR. FREEDLANDER TOOK NO EXCEPTION, CONSTRUCTION WAS HELD UP FOR IN EXCESS OF 60 DAYS BECAUSE OF VERY SEVERE WEATHER CONDITIONS WHICH PREVENTED WORK FROM BEING DONE. MR. NEWMAN ALSO TESTIFIED THAT THERE WAS A DELAY OF MORE THAN ONE MONTH BECAUSE OF THE NEED FOR THE FILL DIRT. THE TIME NEEDED FOR IT TO DRY AND TO BE COMPACTED BEFORE CONSTRUCTION COULD BEGIN. THERE WERE STOP ORDERS ISSUED BY THE CITY OF SALISBURY BECAUSE OF REQUIREMENT FOR FIRE BLOCKING, NEITHER OF WHICH WAS THE FAULT OF NSC. THESE ITEMS CAUSED

DELAYS ACCORDING TO MR. NEWMAN OF TWO TO THREE WEEKS EACH.

IN ADDITION, THERE WAS ANOTHER DELAY CAUSED BY THE FAILURE OF MR. FREEDLANDER TO OBTAIN SUFFICIENT CARPETING AFTER TWIN PARKS ASSUMED THE RESPONSIBILITY OF OBTAINING THE CARPETING. THERE WAS YET ANOTHER FURTHER DELAY CAUSED BY THE DELAY OF DELMARVA POWER AND LIGHT COMPANY TO HOOK UP THE ELECTRICITY TO THE UNITS. THE UNITS WERE SUBSTANTIALLY COMPLETED ACCORDING TO THE TESTIMONY ON SEPTEMBER 8TH, 1978. BY THAT TIME NSC HAD DONE EVERYTHING REQUIRED TO RECEIVE THE HOOK UP BUT IT WAS NOT UNTIL LATE SEPTEMBER OR EARLY OCTOBER, THREE OR FOUR WEEKS LATER, AND THREE TO FOUR WEEKS AFTER IT WAS CONTACTED THAT DELMARVA WAS ABLE TO PERFORM THE WORK.

FURTHER, ALL PAYMENTS WERE MADE UNDER THE CONTRACT AND ALL REQUISITIONS WERE ACCEPTED, APPROVED AND PAID AND IF THERE HAD BEEN ANY GROUNDS TO TERMINATE

THE CONTRACT BECAUSE OF THE DELAY, THAT DEFAULT HAD BEEN WAIVED BY THE PAYMENT OF THE CONTRACT PRICE, THE ACCEPTANCE AND THE APPROVAL OF THE REQUISITIONS FOR PAYMENTS.

WITH RESPECT TO COMPLETION, AND WORKMANSHIP OF THE 16 UNITS, TWIN PARKS CALLED ROBERT CULVER AS A WITNESS. MR. CULVER HAD BEEN HIRED BY TWIN PARKS AS A MANAGEMENT AGENT. HE CAME ON THE SITE IN JULY OR AUGIST AFTER THE PROJECT WAS NEARING SUBSTANTIAL COMPLETION. HE WAS RELATIVELY INEXPERIENCED. HE HAS ONLY BEEN A REAL ESTATE BROKER FOR ABOUT FOUR AND A HALF YEARS AND THE TWIN PARKS PROJECT WAS THE FIRST TIME HE HAD BEEN A MANAGEMENT AGENT FOR NEWLY CONSTRUCTED TOWNHOUSES.

THE ESSENSE OF HIS TESTIMONY WAS THAT MR. NEWMAN GAVE HIM DATES ON WHICH HE COULD START LEASING THE UNITS. THERE APPEARS TO BE NO DISPUTE BETWEEN THE TESTIMONY OF CULVER AND NEWMAN THAT THE

EARLIEST DATE GIVEN TO HIM ON WHICH THE UNITS COULD BE READY FOR LEASING WAS AUGUST. AS A RESULT, HE OBTAINED ONE OR MORE LEASES THAT WERE TO BEGIN SEPTEMBER FIRST, 1978, BUT THEY COULD NOT BE LEASED ON THAT DATE BECAUSE NO OCCUPANCY PERMIT HAD YET BEEN ISSUED. HE DID BEGIN TO LEASE THE UNITS IN OCTOBER AFTER THE CERTIFICATE OF OCCUPANCY HAD BEEN ISSUED ON OCTOBER 13TH. CERTIFICATE OF APPROVAL AS TO PLUMBING HAD ALREADY BEEN ISSUED ON SEPTEMBER 12, 1978. MOST IF NOT ALL OF THE DELAY IN THE ISSUANCE OF THE CERTIFICATE OF OCCUPANCY, THE COURT FINDS, WAS CAUSED BY DELMARVA POWER AND LIGHT COMPANY'S DELAY IN DOING ITS WORK. THERE WAS NO DEFINITIVE TESTIMONY AS TO THE EXTENT OF ANY DIRECT LOSS OCCASIONED BY TWIN PARKS AS A RESULT OF THE AVAILABILITY DATE OF THE UNITS EXCEPT POSSIBLY ONE OR AT BEST TWO MONTHS RENT LOSS OF $275 FOR SIX UNITS. CULVER ALSO TESTI-

FIED THAT HE DID SOME WORK ON THE UNITS HIMSELF AND HAD TO CALL IN SOME WORKMEN TO DO SOME WORK WHICH HAD NOT BEEN DONE BY NSC.

THIS APPEARS TO BE DEMINIMIS. HIS TOTAL EXPENDITURE APPEARS TO BE $255 AND POSSIBLY AN ADDITIONAL HUNDRED DOLLARS FOR OTHER WORK, THE MAJORITY OF WHICH APPEARS TO BE FOR SOME ELECTRICAL AND TOUCH UP WORK.

NEWMAN TESTIFIED, AND CULVER ADMITS, THAT CULVER DID THE WORK WITHOUT NOTIFYING NSC AND WITHOUT NSC'S AUTHORITY.

MR. NEWMAN TESTIFIED THAT HE KNEW OF NO PAINTING OR ELECTRICAL WORK DONE BY TWIN PARKS OR CULVER. CULVER ALSO TESTIFIED THAT HE BELIEVED THAT GIVEN TIME, NSC WOULD DO THE WORK AND THE REASON HE DID IT WAS BECAUSE HE WAS RECEIVING COMPLAINTS FROM THE TENANTS. NO BILLS FOR THIS WORK WERE EVER SENT TO NSC NOR WERE THERE ANY CHARGEBACKS MADE BY TWIN PARKS AGAINST

NSC, NOR WERE ANY OBJECTIONS MADE BY TWIN PARKS TO THE REQUISITIONS OF NSC.

TWIN PARKS ALSO CALLED MR. CHARLES ROHN TO TESTIFY AS TO THE WORKMANSHIP ON THE JOB. HE WAS EMPLOYED BY THE ARCHITECTURAL FIRM HIRED BY METROPOLIS TO MAKE SITE OBSERVATIONS FOR DRAWS. MR. ROHN DISTINGUISHED HIS DUTIES FROM THOSE OF AN INSPECTOR. ON EACH OCCASION EXCEPT THE LAST WHERE HE PREPARED A PUNCH LIST HE CONSIDERED HIMSELF AN OBSERVER AND NOT AN INSPECTOR, ON THE LAST OCCASION HE CONSIDERED HIMSELF AN INSPECTOR. THE ESSENCE OF HIS TESTIMONY WAS THAT ANY ASSESSMENT OF WORKMANSHIP WAS TO A GREAT EXTENT SUBJECTIVE. HE SAID THAT, "WORKMANSHIP WAS IN THE EYES OF THE BEHOLDER." BUT HE SAID OBJECTIVELY, THAT GENERALLY THE QUALITY OF THE WORK WAS ACCEPTABLE. THE VARIOUS AGENCIES FROM THE CITY OF SALISBURY, THAT'S THE PLUMBING AND THE ELECTRICAL PEOPLE, HAD INSPECTED THE SITE ON

A WEEKLY BASIS AND HAD APPROVED THE WORK AND HE WAS SATISFIED BECAUSE HE RESPECTS THEIR JUDGMENT. HE TESTIFIED HE HAD TWO VERY MINOR ADJUSTMENT PROBLEMS WITH RESPECT TO TWO OF NSC'S DRAWINGS. REQUISITIONS NUMBER TWO AND REQUISITION NUMBER 7. THE PROBLEM WITH REQUISITION NUMBER 7 HAD TO DO WITH THE ADJUSTMENT OF THE 17,000 DOLLARS BECAUSE OF THE APPLIANCES WHICH NSC HAD UNDERTAKEN TO DO.

WITH RESPECT TO REQUISITION NUMBER TWO, IT WAS REDUCED BY $2,000 FOR MASONRY WORK AND $2,000 FOR CARPENTRY WORK WHICH HAD NOT REACHED THE STAGE OF COMPLETION NECESSARY FOR THE DRAW. EXCEPT FOR THOSE ITEMS, NO OTHER ADJUSTMENTS WERE MADE.

MR. ROHN TESTIFIED THAT AS OF JUNE 2, 1978, THE PROJECT WAS GOING WELL AND HE SO NOTIFIED METROPOLIS. HE APPROVED ALL REQUISITIONS. NO AMOUNTS WERE HELD BACK BECAUSE OF DELAYS, OR WORKMANSHIP OR ANY

OTHER REASON EXCEPT FOR THE TWO MINOR ADJUSTMENTS ON REQUISITIONS 2 AND 7.

WHEN HE MADE UP THE PUNCH LIST, MR. NEWMAN WAS WITH HIM. THE PUNCH LIST CONTAINED BASICALLY MINOR AND TOUCH UP ITEMS. HE SAID THAT THE WORK WAS GENERALLY ACEPTABLE AND THAT WAS ALL THAT WAS REQUIRED. ACCORDING TO THE TESTIMONY OF BOTH MR. NEWMAN AND MR. ARNOLD, ALL OF THE ITEMS ON THE PUNCH LIST FOR WHICH NSC WAS RESPONSIBLE WERE IN FACT COMPLETED.

EXCEPT FOR SOME VAGUE REFERENCES IN A LETTER OF AUGUST 28TH, 1978, WHICH WOULD BE DEFENDANT'S EXHIBIT NUMBER 4, MR. FREEDLANDER MADE NO SIGNIFICANT COMPLAINTS ALONG THE WAY ABOUT THE WORKMANSHIP OR MATERIALS, NO CLAIM OR BAKC CHARGES WERE MADE BY TWIN PARKS AGAINST NSC DURING THE COURSE OF CONSTRUCTION OR PRIOR TO THE FINAL DRAW. ALL REQUISITIONS WERE APPROVED. FINAL PAYMENT WAS MADE TO NSC ON SEPTEMBER 29TH, 1978, WHICH RESULTED IN

PAYMENT OF ONE HUNDRED PERCENT OF THE CONTRACT PRICE AFTER CREDITS HAD BEEN GIVEN TO TWIN PARKS FOR CERTAIN ITEMS WHICH THEY HAD ASSUMED.

IT WAS NOT UNTIL MR. FREEDLANDER RECEIVED THE REQUEST FOR PAYMENT FOR THE EXTRAS THAT TWIN PARKS TERMINATED THE CONTRACT.

ON MARCH FIFTH, 1979, NSC SENT A LETTER TO MR. FREEDLANDER, PLAINTIFF'S EXHIBIT NUMBER 27, ADVISING HIM THAT IF PAYMENT WAS NOT RECEIVED WITHIN SEVEN DAYS NSC WOULD TURN THE MATTER OVER TO ITS ATTORNEYS TO INSTITUTE SUIT AND OBTAIN MECHANICS LIENS.

NSC FURTHER ADVISED MR. FREEDLANDER THAT THEY WOULD NOT START ANY OTHER WORK UNTIL THE BALANCE WAS PAID. IT WAS NOT UNTIL DECEMBER THE 12TH, 1978, THAT TWIN PARKS FORMALLY NOTIFIED NSC OF ANY SPECIFIC AND DEFINITIVE COMPLAINTS THAT IT HAD WITH RESPECT TO THE NON-

PERFORMANCE AND POOR WORKMANSHIP BY NSC AND DECLARED THE CONTRACT TO BE IN DEFAULT BY NSC. THAT WOULD BE DEFENDANT'S EXHIBIT NUMBER 3. THAT WAS FOLLOWED BY A DEMAND AND TERMINATION LETTER FROM TWIN PARKS' ATTORNEY ON DECEMBER 15, 1978. MR. FREEDLANDER SAYS THAT NSC NEVER FINISHED THE JOB PRIMARILY BECAUSE THEY FAILED TO CONSTRUCT STORAGE SHED AS CALLED FOR IN THE CONTRACT.

WITH RESPECT TO THOSE STORAGE SHEDS, BOTH MR. NEWMAN AND MR. ARNOLD TESTIFIED THAT IT WAS MR. FREEDLANDER WHO DID NOT WANT THE SHEDS AND INSTEAD AGREED TO THE ENLARGED PATIOS. ALTHOUGH RM. FREEDLANDER TESTIFIED THAT HE NEVER AGREED TO EXTEND THE PATIOS IN LIEU OF THE SHEDS, THE WORK APPARENTLY WAS IN FACT DONE AT ADDITIONAL EXPENSE TO NSC WITHOUG ANY OBJECTION BY MR. FREEDLANDER UNTIL THE JOB WAS COMPLETED, EVEN THOUGH

MR. FREEDLANDER TESTIFIED THAT HE WENT TO THE JOB SITE REGULARLY AND COULD SEE WHAT WAS BEING DONE.

BASED ON THE PAST PRACTICE OF THE PARTIES IN NOT USING WRITTEN CHANGE ORDERS, THE COURT CAN FIND THAT THE PARTIES EITHER EXPRESSLY OR IMPLIEDLY ORALLY AGREED TO THIS CAHNGE AND THE COURT SO FINDS.

WITH RESPECT TO DAMAGES CLAIMED IN THE COUNTERCLAIM, MR. FREEDLANDER TESTIFIED THAT IT WAS BECAUSE OF NSC'S DEFAULT THAT THE ENTIRE PROCESS OF RENTING OUT THE UNIT WAS AFFECTED, THAT TWIN PARKS LOST ITS FINANCES FOR THE OTHER 30 UNITS BECAUSE METROPOLIS WOULD NOT ADVANCE ANY OTHER FUNDS BECAUSE OF THE CONTINUOUS DELAYS, THAT IT WOULD COST AN ADDITIONAL $377,300.00 TO CONSTRUCT THOSE UNITS TODAY AT TODAY'S PRICES INSTEAD OF THOSE IN 1978, THAT THERE HAD BEEN A LOSS OF INCOME FROM THE 30 UNITS, THAT TWIN PARKS' REPU-

TATION AND GOOD WILL HAD BEEN ADVERSELY AFFECTED AND THAT LOSS OF FINANCING PRECIPITATED THE FILING OF THE CHAPTER XII IN THIS COURT.

ASSUMING THAT NSC DID BREACH THE CONTRACT, WHICH THE COURT DOES NOT FIND, THERE HAS BEEN SUBSTANTIAL EVIDENCE PRODUCED BY WHICH THE COURT COULD ALSO FIND THAT THE TROUBLES AND LOSSES OCCASIONED BY TWIN PARKS WERE NOT CAUSED BY ANY ACTS OF NSC BUT BY TWIN PARKS ITSELF.

ON CROSS-EXAMINATION MR. FREEDLANDER TESTIFIED THAT HE DID NOT ATTEMPT TO MAKE ANY IMMEDIATE EFFORTS TO OBTAIN FINANCING FROM ANY OTHER SOURCE. HE WAS STILL NEGOTIATING WITH METROPOLIS. ONLY SIX OF THE 16 EXISTING UNITS WERE RENTED IN 1978 AND THERE WERE PROBLEMS WITH THE OTHERS AS OF OCTOBER 17TH, 1978, AS SHOWN ON PLAINTIFF'S EXHIBIT NUMBER 38.

THUS, THERE WERE SEVERE CASH

FLOW PROBLEMS IRRESPECTIVE OF THE NEW UNITS. THE LOAN WAS NOT CALLED BY METROPOLIS UNTIL APRIL 1979, LONG AFTER NSC WAS OFF THE JOB. THE LOAN WAS CALLED BECAUSE TWIN PARKS WAS UNABLE TO MAKE ITS MORTGAGE PAYMENTS. IT WAS IN ARREARS FOR A PERIOD OF FIVE OR SIX MONTHS ACCORDING TO MR. FREEDLANDER'S TESTIMONY AND FORECLOSURE HAS BEGUN. THE CITY OF SALISBURY REQUIRED ADDITIONAL ITEMS LISTED IN PLAINTIFF'S EXHIBITS NUMBER 39 AND 40, PARKING LOT, CONCRETE WALL SIDEWALKS, BASKETBALL COURTS, LIGHT POSTS WHICH HAD BEEN SHOWN ON THE SITE PLAN APPROVED BY THE CITY IN 1972 AND WERE REQUIRED TO BE INSTALLED AS A CONDITION TO THE CONSTRUCTION OF THE OTHER 30 UNITS.

THE ESTIMATED COST OF THESE ITEMS WOULD BE APPROXIMATELY $120,000. ALTHOUGH MR. FREEDLANDER SAID THAT HE WOULD HAVE GONE BACK TO METROPOLIS FOR ADDITIONAL FUNDS, THERE IS A SUBSTANTIAL DOUBT THAT METROP-

PLIS WOULD HAVE AGREED TO ADVANCE ANY ADDITIONAL FUNDS AT THAT STAGE OF THE GAME. MR. FREEDLANDER ALSO TESTIFIED THAT HE COULD NOT GET FINANCING FROM OTHER LENDERS BECAUSE THE LOAN WAS IN MR. FREEDLANDER'S LANGUAGE NOT ATTRACTIVE TO MAKE.

THERE IS NO NEED, HOWEVER, TO DETERMINE WHAT, IF ANY, DAMAGES WERE SUFFERED BY TWIN PARKS AS A RESULT OF THE BREACH OF THE CONTRACT ON THE PART OF NSC SINCE BASED ON ALL THE EVIDENCE THE COURT FINDS THAT THERE WAS NO MATERIAL BREACH OF THE CONTRACT BY NSC.

THE COURT FINDS THAT NSC WAS JUSTIFIED IN NOT PROCEEDING WITH ANY WORK ON THE OTHER 30 UNITS UNTIL IT HAD BEEN PAID FOR THE EXTRA WORK DONE ON THE 16 WHICH IT HAD CONSTRUCTED.

INSTEAD, THE COURT FINDS THAT IT WAS THE FIALURE OF TWIN PARKS TO PAY FOR THE EXTRA WORK AND THE EXTRA EXPENSES

INCURRED BY NSC WHICH CONSTITUTED THE BREACH AND JUSTIFIED THE ACTIONS OF NSC. THEREFORE, THE COUNTERCLAIM WILL BE DISMISSED.

THE COURT WILL THEREFORE AWARD JUDGMENT FOR DAMAGES TO NSC IN THE FOLLOWING AMOUNTS.

FENCE: $12,368.0 1.

FILL: $13,738.50.

BOND PREMIUM: $4,604.60.

REPAYMENT OF LOAN: $6,000.00.

THOSE AMOUNTS TO BEAR INTEREST AT THE LEGAL RATE FROM OCTOBER 13, 1981.

MR. KENT, YOU PREPARE THE ORDER. THERE WILL BE NO FEES -- I'M SORRY. 1978. OCTOBER 13, 1978. THERE WILL BE NO AWARD OF COUNSEL FEE OR COSTS IN CONNECTION WITH THE DISCOVERY. THAT'S THE OTHER OPEN MATTER, MR. KENT.

MR. KENT: THANK YOU, YOUR HONOR.

THE COURT: ANY QUESTIONS, GENTLEMEN? IF NOT, MR. KENT, YOU CAN PREPARE

THE ORDER.

MR. KENT: YOUR HONOR, JUST FOR POINT OF INFORMATION, WILL THE ORDER INCLUDE COSTS TAXED TO DEFENDANT?

THE COURT: THE COST OF THE SUIT? WHAT'S THE COST? $60?

MR. KENT: COURT COSTS.

THE COURT: $60?

MR. KENT: THERE MAY BE OTHER COSTS ALSO.

THE COURT: ALL RIGHT. COSTS TO BE PAID BY THE DEFENDANT.

MR. KENT: THANK YOU, YOUR HONOR.

THE COURT: NO COUNSEL FEE.

MR. LIPSITZ: SIR?

THE COURT: DOES NOT INCLUDE COUNSEL FEE.

MR. LIPSITZ: WELL, ALL RIGHT. WELL, COSTS WERE FIXED AS OF NOW, YOUR HONOR, NOT ANY FUTURE COSTS HE'S GOING TO COME UP WITH.

THE COURT: COSTS ARE FIXED AS OF TODAY'S JUDGMENT, NOT BEYOND, AND IT WILL NOT INCLUDE COUNSEL FEES.

MR. KENT: UNDERSTOOD, YOUR HONOR. THANK YOU.

MR. LIPSITZ: THANK YOU, YOUR HONOR.

(THEREUPON, AT 1:10 P.M., THE HEARING WAS ADJOURNED.)

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

IN RE	:	
TWIN PARKS LIMITED PARTNERSHIP,	:	
Debtor.	:	
: : : : : : : : : : :		
N.S.C. CONTRACTORS, INC.	:	Case No.
Plaintiff,	:	79-0129-L
v.	:	
TWIN PARKS LIMITED PARTNERSHIP,	:	
Defendant.	:	

O R D E R

This action having come before the court, Honorable Harvey M. Lebowitz, United States Bankruptcy Judge, presiding, for trial on the claims by plaintiff N.S.C. Contractors, Inc. for breach of contract and monies owed, and the Counterclaim by defendant Twin Parks Limited Partnership for breach of contract, and the issues having been duly tried with witnesses having testified, documents being introduced into evidence and the

case having been fully argued, and after consideration of the evidence, the pre-trial memoranda of law filed by the parties and their respective oral arguments, and a decision, including findings of fact and conclusions of law, having been duly rendered by the Court on the record on May 9, 1981; it is by the Court this 14th day of May, 1981.

ORDERED AND ADJUDGED that plaintiff N.S.C. Contractors, Inc. recover of the defendant Twin Parks Limited Partnership the sum of $36,711.11, together with interest thereon from October 13, 1978, at the legal rate (to wit, 6% per annum to June 30, 1980, and 10% per annum thereafter), and plaintiff's costs in this matter in the sum of $1,271.45; and it is

FURTHER ORDERED AND ADJUDGED that defendant Twin Parks Limited Partnership take nothing, and that its Counterclaim be dismissed on the merits.

/s/ Harvey M. Lebowitz
UNITED STATES BANKRUPTCY JUDGE